

Beyond Restorative Justice: Prioritising Deliberative Self-Determination in Indigenous Sentencing Court Systems

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Abstract

Indigenous Sentencing Courts ('ISCs') are inadequately understood solely as restorative justice institutions. Instead, an alternative theory — 'deliberative democracy' — may help us analyse and understand the value of these courts. By examining a cross-section of ISC systems throughout Australian jurisdictions, I argue that the cultural and political aims associated with the introduction of ISCs calls for an alternative theory that takes greater account of the participatory role of Elders and Respected Persons and the broader social impact these courts seek to make. A broadened understanding of ISCs' value to both state justice systems and Indigenous goals of self-determination emerges by considering the extent to which ISCs offer inclusive, authentic, and consequential deliberation to Elders and Respected Persons who assist the court in reaching a sentencing decision.

I Introduction

In this article, I use the term 'Indigenous Sentencing Courts' ('ISCs') to refer generally to Indigenous sentencing 'court' systems (also known as 'circle sentencing courts') as introduced in state and territory jurisdictions across Australia.¹ As specialist sentencing institutions, ISCs are inadequately understood through theories of restorative justice and therapeutic jurisprudence. In this article, I put forward deliberative democracy as an alternative framework for understanding the value of these courts. Cultural and political objectives associated with the introduction of ISCs are at odds with traditional sentencing principles and narrow measures of

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¹ Cf Rudin's discussion of circle sentencing in Canada's criminal justice system: Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Emond, 2nd ed, 2022) ch 8.

efficacy. Instead, ISCs, as internally deliberative institutions, are best understood through the lens of ideals associated with deliberative democracy, which prioritises and provides an evaluative framework for assessing the quality of the deliberation that occurs within these court sites, and the positive effect this deliberation might have on the broader intercultural dialogue between Aboriginal and non-Aboriginal cultures and their respective justice systems. When evaluated based upon ideals such as whether legitimate deliberation takes place in an *inclusive, authentic* and *consequential* manner, the value of ISCs as systems for enabling Indigenous communities' meaningful participation and self-determination in justice processes is brought into the foreground. Deliberative democracy provides a lens to assess the positive outcomes of ISCs that differs greatly from commonly used and simplistic measures of efficacy relied upon by governments, such as rehabilitation of the offender and recidivism rates.

In Part II of this article, I discuss the history of ISCs. I focus on the distinct aims and objectives under which ICSs are promoted, and how their operational structures differ to that of mainstream court systems. Taking these distinct aims, objectives and structures into account highlights that traditional theories of restorative justice and therapeutic jurisprudence are inadequate for assessing the value of these courts. Furthermore, theories of restorative justice prioritise normative sentencing principles such as 'the 'public interest [in the] rehabilitation of the offender and avoidance of recidivism' over the broader aims and goals of Indigenous people.²

In Part III of this article, I examine deliberative democracy as an applied theory, considering its efficacy and appropriateness as an alternative evaluative framework. I discuss how deliberative democracy is defined, and whether the theory, as articulated as part of a western philosophical tradition, should be used as a framework of analysis. I then argue that Dryzek's deliberative capacity hallmarks of inclusivity, authenticity and consequentiality offer an evaluative framework in which the procedure and internally deliberative aspects of ISCs may be examined, specifically the deliberation between Indigenous Elders and presiding judicial officers. Furthermore, I examine deliberative democracy's record in applied contexts.

Finally, in Part IV I bring ISCs and deliberative democracy together. I examine how the laws governing ISCs enable legitimate deliberation by Indigenous Elders and Respected Persons, and identify factors that may undermine this legitimacy. I conclude that evaluating ISCs based upon the presence or absence of deliberative capacity hallmarks promotes a shared language or hybridity between legal systems where both legal systems may be more amenable to mutually inform and understand the values of the other.

² *R v Fernando* (1992) 76 A Crim R 58, 63 (Wood J) ('*Fernando*').

II Indigenous Sentencing Courts and Restorative Justice

ISCs are specialist courts³ established in most Australian states and territories by governments, and designed to reform sentencing for Aboriginal and Torres Strait Islander individuals through culturally appropriate and inclusive practices. ISCs operate at multiple levels of the judicial system. For example, in Victoria, the Koori Court operates at the Children's Court, Magistrates' Court and County Court levels with respect to both summary and indictable offences.⁴ The Australian Law Reform Commission ('ALRC') reported that ISCs attempt to engage the accused through 'individualised case management' and aim to address 'underlying issues in culturally appropriate ways, including by having Elders participate in sentencing discussion'.⁵ It is through this participation that ISCs seek to enable a process of accountability to the accused's community.⁶ The involvement of Elders in the sentencing process is the central focus of this article.

ISCs focus solely on the sentencing phase of the criminal justice process and require the accused to have entered a guilty plea prior to the matter being heard. Broadly speaking, ISC systems operate alongside, and at the discretion, of mainstream courts, who refer matters for sentencing to the ISC where certain conditions are met. ISCs are created and governed by specific state/territory-based statutes or court practice directions.⁷ These rules also prescribe the circumstances when matters can be transferred to an ISC. Different Australian state and territory jurisdictions have varying eligibility requirements. For example, the accused is generally required to satisfy a range of specific identification, plea and consent requirements for the ISC to have jurisdiction.⁸ ISCs emphasise a culturally sensitive and inclusive format. In contrast to standard courts, judicial officers sit at eye level with offenders and lawyers are positioned similarly. Indigenous Elders or Respected Persons assisting with proceedings do so to represent the accused's community and contribute to the decision-making process. While the role and participation of Elders and Respected Persons varies between jurisdictions, as will be seen, this participation has historically been characterised in restorative or therapeutic justice terms.⁹

³ See further Part IV(A)(1) below. See Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 428, quoting Arie Freiberg, 'Innovations in the Court System' (Conference Paper, Australian Institute of Criminology International Conference on Crime in Australia: International Connections, Melbourne, 30 November 2004) 8.

⁴ See, eg, *County Court Act 1958* (Vic) s 4B. See also County Court of Victoria, *Practice Note PNCR 1-2021: County Koori Court*, 13 May 2021, 3 ('Practice Note PNCR 1-2021').

⁵ Australian Law Reform Commission ('ALRC'), *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 330 [10.38] ('Pathways to Justice Report').

⁶ Marchetti and Daly (n 3) 421.

⁷ See, eg, *County Court Act 1958* (Vic) (n 4). See also ACT Magistrates' Court, *Practice Direction No 2 of 2024: Practice Direction – Galambany Court*, 5 February 2024 ('ACT Practice Direction No 2 of 2024').

⁸ Marchetti and Daly (n 3) 423–4. See also Samantha Jeffries and Philip C Stenning, 'Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries' (2014) 56(4) *Canadian Journal of Criminology and Criminal Justice* 447.

⁹ Marchetti and Daly (n 3) 419, 427.

A *Background to Indigenous Sentencing Courts*

1 *The Australian Criminal Sentencing System*

The Australian criminal sentencing system, informed by the common law, operates largely pursuant to state and territory legislation.¹⁰ Sentencing systems, in both their design and operation, seek to promote principled and purposeful sentencing decisions.¹¹ The normative sentencing principles of the Australian criminal justice system include ‘punishment, deterrence, rehabilitation of the offender, offender accountability, denunciation of the offender’s conduct, community protection, and recognition of the seriousness of the offence and harm to the victim’.¹² This is reflected in legislation. For example, under s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) the purposes of sentencing are defined as:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

Additional sentencing principles have emerged in some jurisdictions that recognise and take account of the disadvantage and collective challenges faced by Indigenous peoples.¹³

In evaluating the efficacy of sentencing programs (including specialist courts), policymakers have given great attention to their effect on rates of recidivism in determining the deterrent effect of any particular policy platform. In 2018 the ALRC reported that

[n]ationally, the proportion of prisoners with a prior record of imprisonment was very high: three quarters (76%) of Aboriginal and Torres Strait Islander prisoners and half (49%) of non-Indigenous prisoners in 2016 had been in custody on at least one previous occasion.¹⁴

The ALRC noted however, among other things, that ‘prior record is not a measure of recidivism’ and that it is ‘incorrect to conclude that, because 76% of Aboriginal and Torres Strait Islander prisoners may be repeat offenders, the recidivism rate is 76%’.¹⁵ Rates of recidivism are a problematic metric for judging sentencing efficacy

¹⁰ See generally *Crimes (Sentencing) Act 2005* (ACT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1991* (Vic).

¹¹ See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

¹² Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 10. See especially *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 3–4; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

¹³ *Fernando* (n 2) 62–3 (per Wood J); see generally *Bugmy v The Queen* (2013) 249 CLR 571.

¹⁴ *Pathways to Justice Report* (n 5) 120 [3.70].

¹⁵ *Ibid* 119 [3.69].

due to the inaccuracy of ‘prior record’ as a statistic generally.¹⁶ Further, as will be discussed Part II(E) below, reliance on recidivism rates may lead to Indigeneity being viewed through a lens of risk.¹⁷

2 *Indigenous Sentencing Courts in Australia*

In 1999, the first formalised Australian ISC was established in South Australia.¹⁸ The only remaining Australian jurisdiction yet to adopt an ISC system is Tasmania.¹⁹ The legislative design and operation of ISCs varies between Australian states and territories. Some courts, such as the Victorian Koori Courts emphasise participation of the Aboriginal community, while others, such as the Galambany Court in the Australian Capital Territory (ACT), prioritise restorative justice goals.²⁰ In most jurisdictions across Australia, these courts complement mainstream judicial and criminal justice systems. ISCs, as Stobbs and McKenzie have noted, are diverse among jurisdictions, with nuanced procedural differences at each site.²¹ Importantly, ISCs do not practice or adopt Indigenous customary law.²² Rather, they operate pursuant to and enforce Australian laws when sentencing.²³ In ISCs, the Magistrate or Judge ‘retains the ultimate power in sentencing the offender’.²⁴ ISCs’ point of difference is that they provide an opportunity for participation in the process by Indigenous Elders or Respected Persons.²⁵

Threshold requirements must be met for a matter to be heard by an ISC. These include Aboriginal identification,²⁶ whereby the accused

- (a) is descended from an Aborigine, Aboriginal person or Torres Strait Islander; or
- (b) identifies as an Aborigine, Aboriginal person or Torres Strait Islander; or
- (c) is accepted as an Aborigine person or Torres Strait Islander by an Aboriginal or Torres Strait Island community.²⁷

¹⁶ Ibid.

¹⁷ Anthony (n 12) draws attention to the justice system’s characterisation of dysfunction within Indigenous communities, which become ‘viewed as perpetuating criminality’: at 77. Similarly, ‘deterrence, victimization (sic) and community protection are construed to engender Indigeneity as a risk factor’: at 77.

¹⁸ Marchetti and Daly (n 3) 416.

¹⁹ Ibid. See also Tasmania Law Reform Institute, *Circle Sentencing* (Research Brief, December 2024) 1 [1.1].

²⁰ See, eg, *County Court Act 1958* (Vic) (n 4) s 4G. Cf *ACT Practice Direction No 2 of 2024* (n 7) paras 6(e), (g).

²¹ Nigel Stobbs and Geraldine Mackenzie, ‘Evaluating the Performance of Indigenous Sentencing Courts’ (2009) 13(2) *Australian Indigenous Law Review* 90, 100.

²² Contrast can be made to instances where courts have recognised application of customary punishment practices such as ‘spearing, shaming and banishment’: see Marchetti and Daly (n 3) 420. See also *Sentencing Act 1995* (NT) s 104A (‘Special provisions regarding cultural information’); Jeffries and Stenning (n 8).

²³ Marchetti and Daly (n 3) 420.

²⁴ Ibid 421. See, eg, Queensland Magistrates’ Court, *Practice Direction No 2 of 2016 (Amended)*: *Queensland Murri Court*, 16 May 2017, para 1(b) (‘*Qld Practice Direction No 2 of 2016 (Amended)*’).

²⁵ Marchetti and Daly (n 3) 420.

²⁶ See, eg, *ACT Practice Direction No 2 of 2024* (n 7) para 27(a); *County Court Act 1958* (Vic) (n 4) s 4E(a); *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) para 14(a).

²⁷ See, eg, *County Court Act 1958* (Vic) (n 4) s 3(1) (definition of ‘Aborigine’); *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) para 14(a).

The victim of the offence is not required to meet this identification requirement. An accused must have entered a guilty plea ‘or have been found guilty in a summary hearing’.²⁸ Consent by the accused is required for the matter to be heard by an ISC.²⁹ Furthermore, any criminal proceeding ‘must be one that is normally heard in a Magistrates’ or Local Court’,³⁰ noting that in Victoria, the Koori Court system has in recent years expanded to include the County Court level.³¹ In most jurisdictions, there is also a geographical requirement that ‘the offence ... occurred in the geographical area covered by the court’.³²

Marchetti and Daly have identified three key reasons why governments have sought to establish ISCs.³³ First, they aim to ‘reduce the over-representation of Indigenous people in custody’.³⁴ Second, they may provide an ‘opportunity for governments to address key recommendations made by the Royal Commission into Aboriginal Deaths in Custody’.³⁵ These recommendations included ‘reducing Indigenous incarceration, increasing the participation of Indigenous people in the justice system as court staff or advisors, and identifying mechanisms for Indigenous communities to resolve disputes and deal with offenders in culturally appropriate ways’.³⁶ Third, ISCs have been established to complement Aboriginal Justice Agreements responding to the issue of over incarceration.³⁷

3 *Types of Offences Heard by Indigenous Sentencing Courts*

Each jurisdiction differs in the types of offences that can be heard in their ISC system. Victoria takes a broad approach, for example the Koori Court, at the Magistrates’ Court level, can hear all offences able to be finalised in the Magistrates’ Court,³⁸ with the exception of sexual offences.³⁹ Other jurisdictions, like the ACT’s Galambany Court, exclude certain offence types including sexual offences and indictable offences where the matter cannot be heard summarily.⁴⁰ By contrast, South Australia’s Nunga Court division does not specifically exclude any particular offence type. Rather, the defendant must seek consent from the Director of Public Prosecutions for sentencing proceedings relating to a major indictable offence be transferred into the Nunga Court.⁴¹

²⁸ Marchetti and Daly (n 3) 421. See also Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World* (Palgrave Macmillan, 2019) 258.

²⁹ Marchetti and Daly (n 3) 421.

³⁰ Ibid.

³¹ See *County Court Act 1958* (Vic) (n 4) s 4A.

³² Marchetti and Daly (n 3) 421.

³³ Ibid 422–3. See also Jeffries and Stenning (n 8) 468.

³⁴ Marchetti and Daly (n 3) 422.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid. See, eg, *The Victorian Aboriginal Justice Agreement: State Government of Victoria, Burra Lotjpa Dunguludja: The Agreement* (Web Page, 5 August 2024) <<https://www.aboriginaljustice.vic.gov.au/the-agreement/the-victorian-aboriginal-justice-agreement>>. See also *Pathways to Justice Report* (n 5) 499–500 [16.28].

³⁸ *Magistrates’ Court Act 1989* (Vic) s 25.

³⁹ Ibid s 4F(1)(b)(i).

⁴⁰ *ACT Practice Direction No 2 of 2024* (n 7) paras 8(b)–(c).

⁴¹ Courts Administration Authority of South Australia, *Nunga Court Bench Book: A Bench Book for the Nunga Court at Port Adelaide and Murray Bridge*, 1 February 2024, 16.

4 *Key Features and Values of Indigenous Sentencing Courts*

Central to ISCs is the inclusion and involvement of community. In the ACT, the Galambany Court aims to provide ‘effective and restorative processes to Aboriginal and Torres Strait Islander defendants through community involvement in sentencing’.⁴² The Ngunnawal word ‘galambany’ is understood to mean ‘we all, including you’, indicative of the aim of community participation.⁴³ During the establishment of the Victorian Koori Court, the Honourable Justin Madden stated during the second reading speech that the Koori Court aimed to create

an informal and accessible atmosphere ... allowing greater participation by the Aboriginal community through the Koori [E]lder or [R]espected [P]erson, Aboriginal justice worker, [I]ndigenous offenders and their extended families or wide group of connected kin, and if desired, victims in the [C]ourt and sentencing process.⁴⁴

Elders and Respected Persons appear in advisory capacities to the Magistrate, and are tasked with speaking with the offender, and providing views to the Magistrate about the nature of the defendant’s conduct in relation to the respective community.⁴⁵ In some ISC systems, Elders and Respected Persons may be involved in interviewing the defendant, preparing written pre-sentence reports to the Magistrate, and may assist with post-sentence monitoring and support.⁴⁶

B *How Indigenous Sentencing Courts Fit within the Restorative Justice Framework*

The term ‘restorative justice’ is largely attributed to Albert Eglash,⁴⁷ for whom restorative justice was one of three ‘forms’ of criminal justice: retributive, distributive and restorative.⁴⁸ The term ‘restorative justice’ was defined by Tony Marshall in his 1999 UK Home Office study as ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.⁴⁹

Latimer, Dowden and Muise argued that the term restorative justice is used interchangeably with concepts such as ‘community justice, transformative justice, peacemaking criminology, and relational justice’.⁵⁰ The term ‘therapeutic jurisprudence’ is also often used, and confused, in discourse concerning restorative

⁴² ACT Magistrates Court, *Galambany Court* (Web Page) <www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/galambany-court>.

⁴³ Ibid.

⁴⁴ Victoria, *Parliamentary Debates*, Legislative Council, 29 May 2002, 1283 (Justin Madden) (‘Magistrates’ Court (Koori Court) Bill Second Reading’).

⁴⁵ Marchetti and Daly (n 3) 421 n 16.

⁴⁶ Ibid.

⁴⁷ Shadd Maruna, ‘The Role of Wounded Healing in Restorative Justice. An Appreciation of Albert Eglash’ (2014) 2(1) *Restorative Justice: An International Journal* 9, 9–11.

⁴⁸ Theo Gavrielides, ‘Restorative Justice — The Perplexing Concept: Conceptual Fault-Lines and Power Battles within the Restorative Justice Movement’ (2008) 8(2) *Criminology and Criminal Justice* 165, 167.

⁴⁹ Tony E Marshall, *Restorative Justice: An Overview* (Home Office (UK) Research Development and Statistics Directorate, 1999) 5.

⁵⁰ Jeff Latimer, Craig Dowden and Danielle Muise, ‘The Effectiveness of Restorative Justice Practices: A Meta-Analysis’ (2005) 85(2) *The Prison Journal* 127, 128.

justice.⁵¹ It is important to distinguish therapeutic jurisprudence, which is defined as ‘the study of how the law, its officials, processes and institutions affect the people who come under its influence’.⁵² Therapeutic jurisprudence applies many restorative justice principles, however this term inherently pathologises the defendant. Therapeutic jurisprudence is associated with so-called ‘solution-focused judging’, whereby the court becomes a ‘facilitator of change’ as opposed to ‘solv[ing] a participant’s “problems”’.⁵³

Restorative justice includes three key ‘elements’: voluntariness, truth-telling and a face-to-face encounter.⁵⁴ In summary, the aims of restorative justice are: voluntariness for all participants; an acceptance of responsibility by the offender; ‘open and honest’ discussion by the offender about the criminal conduct; and the meeting of participants in ‘safe and organized’ settings whereby ‘an appropriate method of repairing the harm’ can be agreed.⁵⁵ Restorative justice facilitates restoring relationships and provides the community with opportunities for healing by reintegrating victims and offenders.⁵⁶

Common restorative justice practices include victim-offender mediation, conferencing, and circle and forum sentencing.⁵⁷ These processes have been implemented in Australia through various pieces of state and territory legislation, such as the *Crimes (Restorative Justice) Act 2004* (ACT),⁵⁸ which outlines key restorative justice principles such as: empowering victims; bringing together victims, offenders and supporters in a safe environment; and prioritising victims’ interests.⁵⁹

C *Limitations in Viewing Indigenous Sentencing Courts through the Lens of Restorative Justice*

When distinguished from other specialist courts that apply restorative justice principles, ISCs may not necessarily involve victims and, instead, take an ‘offender-centred approach’.⁶⁰ For example, the County Koori Court purports to seek inclusive changes to shift the ‘court-community relationships’ by promoting ‘effective communication between the offender and the judicial officer [and] reliance on Indigenous knowledge in the sentencing process ... and the use of penalties better suited to the circumstances of the offender’.⁶¹ There is also a focus on accountability

⁵¹ See, eg, John Braithwaite, ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) 38(2) *Criminal Law Bulletin* 244.

⁵² See generally Magistrate Pauline Spencer, ‘To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts’ (Speech, International Conference on Law and Society, June 2012) 3 <<http://dx.doi.org/10.2139/ssrn.2083370>>.

⁵³ *Ibid.*

⁵⁴ Latimer, Dowden and Muise (n 50) 128.

⁵⁵ *Ibid.* 128.

⁵⁶ *Ibid.* 128–9.

⁵⁷ See generally Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks* (Consultation Paper Summary, April 2010) 150.

⁵⁸ *Crimes (Restorative Justice) Act 2004* (ACT) s 44.

⁵⁹ *Ibid.* ss 6(a)–(c).

⁶⁰ See Gwen Robinson and Joanna Shapland, ‘Reducing Recidivism: A Task for Restorative Justice?’ (2008) 48(3) *The British Journal of Criminology*, 337, 337.

⁶¹ Samantha Brown, ‘Koori Courts and Fairness’ (Master of Science in Applied Criminology Thesis, Northern Arizona University, 2012) 10.

to community and priority given to considering the circumstances of the defendant.⁶² Additionally, ISCs have distinct policy aims that reside outside a restorative justice framing: namely, reducing Indigenous incarceration and responding to justice issues specific to Indigenous communities.⁶³ Many ISCs were established in view of the goals and ambitions set out in now-expired Aboriginal Justice Agreements between state governments and Aboriginal and Torres Strait Islander communities.⁶⁴ More recent agreements in Victoria demonstrate continued advocacy by Indigenous stakeholders to expand and shape the development of the Koori Court system while aspiring to ‘establish justice institutions to exercise self-determination’ and ‘greater Aboriginal authority’.⁶⁵

Tauri has argued that restorative justice is enmeshed within a ‘colonial project of crime control’ and is ‘complicit in the settler-colonial state’s continuing subjugation of Indigenous peoples’.⁶⁶ Woolford argued that restorative justice needs to grapple with the political context in which the theory is situated and the means by which it operates.⁶⁷ We should query whether the aims of restorative justice, and its practices, align with the aims of Indigenous peoples, ISCs and broader justice policy initiatives aimed at redressing legacies of settler-colonial harm. In this respect, alternative theoretical framing is necessary to understand and evaluate these courts.

Restorative justice, as an organising framework, inadequately reflects the broader aims and objectives of Indigenous peoples with respect to the justice system.⁶⁸ The term’s scope has been redefined and repackaged by governments, whereby its practices and ideas are uncertain.⁶⁹ For this reason, Daly has argued that restorative justice lacks clear definition.⁷⁰ This has prompted restorative justice advocates to ‘distinguish practices that are near and far from the restorative ideal’.⁷¹ ISCs are ‘more than just an example of restorative justice or therapeutic jurisprudence’; they are, in fact, ‘unique unto themselves’.⁷² Marchetti and Daly, among others, have argued that because of this uniqueness, a similarly ‘unique theoretical and jurisprudential model’ is required.⁷³ Payne has suggested that ISCs, in the context of their broader influence on the justice system, ‘are politically concerned with social change in race relations’, a concern that goes beyond the scope

⁶² Ibid.

⁶³ Marchetti and Daly (n 3) 422–4.

⁶⁴ Ibid. See further *Pathways to Justice Report* (n 5) 499–500 [16.28]. See especially Department of Justice (Vic), *Victorian Aboriginal Justice Agreement (AJA1 2000–2006)* (2000).

⁶⁵ Department of Justice (Vic), *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (2018) 7, 13, 39, 47. See especially at 13 n 9.

⁶⁶ Juan Marcellus Tauri, ‘What Exactly Are You Restoring Us To? A Critical Examination of Indigenous Experiences of State-Centred Restorative Justice’ (2022) 61(1) *The Howard Journal of Crime and Justice* 53, 56.

⁶⁷ Andrew Woolford and Amanda Nelund, *The Politics of Restorative Justice: A Critical Introduction* (Fernwood, 2nd ed, 2019) 15.

⁶⁸ Marchetti and Daly (n 3) 415.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Brown (n 61) 10, quoting Mark Harris, ‘A Sentencing Conversation’: *Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (Evaluation Report, Department of Justice (Vic), 2006).

⁷³ Marchetti and Daly (n 3) 419.

of a restorative justice paradigm.⁷⁴ Additionally, Cunneen has argued the very efficacy of ISCs' programs relies upon separation from 'state-sponsored' restorative justice labels.⁷⁵ The separation from restorative justice lies in ISCs' ability to empower Indigenous peoples and incorporate their 'perspectives and values' into the judicial and sentencing process.⁷⁶ In this way, ISCs have the potential to be socially and politically 'transformative', at a variety of levels, rather than merely 'restorative'.⁷⁷ ISCs, while not perfect institutions, may be seen to go some way towards answering Anthony's call for a 'postcolonial sentencing paradigm' that 'deconstructs the asymmetrical relationship between the colonizer's [sic] law and Indigenous laws', providing agency to Indigenous participants.⁷⁸

D Self-Determination and Post-Colonial Objectives

The aims of Aboriginal and Torres Strait Islander peoples, as a 'political community' and 'constitutional constituency',⁷⁹ are diverse and multifaceted in the 'post-colonial' context. Aboriginal peoples in Australia have campaigned for societal and structural transformation of the justice system.⁸⁰ Fulfilling these aims requires a 'transformative' approach to justice, as argued for by Anthony.⁸¹ This involves: fostering a 'parity of participation' between Indigenous peoples and the broader legal system in respect of 'legal norm creation and dispensation';⁸² creating systems where Indigenous societies autonomously control and apply their 'laws and governance structures to their members';⁸³ and government engagement with Indigenous peoples which 'decentres postcolonial power'.⁸⁴

These aims mirror some of the broader principles of self-determination outlined in the *UN Declaration on the Rights of Indigenous Peoples*, namely:⁸⁵

- 'the right to self-determination' (art 3)
- 'the right to autonomy or self-government in matters relating to their internal and local affairs' (art 4)
- 'the right to participate in decision-making in matters [affecting] their rights, through representatives chosen by themselves in accordance with

⁷⁴ Jason Payne, 'Aboriginal Sentencing Courts' (Speech, Uluru Criminal Law Conference, 31 August 2012) quoted in Anthony (n 12) 207.

⁷⁵ Anthony (n 12) 206, quoting Chris Cunneen, 'Understanding Restorative Justice through the Lens of Critical Criminology' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 290, 292.

⁷⁶ Anthony (n 12) 206–7.

⁷⁷ Ibid.

⁷⁸ Ibid 69.

⁷⁹ See Shireen Morris, "'The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2020) 43(3) *UNSW Law Journal* 629, 629.

⁸⁰ 'Barunga Statement' (Presented to the Prime Minister of Australia on behalf of the Central and Northern Land Councils, 12 June 1988).

⁸¹ Anthony (n 12) 203.

⁸² Ibid 201.

⁸³ Ibid 203.

⁸⁴ Ibid.

⁸⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

their own procedures, as well as to maintain and develop their own indigenous [sic] decision-making institutions' (art 18); and

- a requirement that the State will 'consult and cooperate in good faith' with Indigenous peoples with respect to laws or administrative measures that may affect them (art 19).

Achieving self-determination has been deemed necessary by Indigenous leaders to: further Indigenous participation and autonomy in Australian parliaments, public life and institutions;⁸⁶ address a lack of institutional accountability to Indigenous peoples;⁸⁷ create 'representative' self-governance structures that 'mediate the interface with Australian governments';⁸⁸ address disadvantage and the 'effects of past discrimination' by 'enabling equal rights';⁸⁹ and ensure the 'views of Indigenous people' are taken into account in relation to laws that affect them.⁹⁰ Indigenous Elders themselves have argued for a coalescence of 'Indigenous and non-Indigenous law' so that they may 'recognise each other', in order to achieve a 'two-way understanding between Indigenous and non-Indigenous laws so one does not prevail over the other'.⁹¹

E *The Public Interest in Offender Rehabilitation and Deterrence versus the Post-Colonial Aims of Indigenous Peoples*

Robinson and Shapland have argued that, among policymakers, interest is growing 'in the capacity of restorative justice interventions to impact positively on rates of recidivism'.⁹² This sees goals such as achieving deterrence, rehabilitation of the offender and reduced recidivism prioritised over accounting for and redressing the post-colonial experience of Indigenous peoples within the justice system.⁹³ Many governments view reduced offender recidivism as the primary rationale for the establishment of ISCs.⁹⁴ Stobbs and McKenzie highlight that the Law Reform Commission of WA openly stated that the wellbeing of participants is not a measure of efficacy, and instead, community-wide benefit must be shown.⁹⁵

Marchetti has argued that the recidivism metric is relied upon where policymakers seek to make funding decisions.⁹⁶ This leaves programs at risk of

⁸⁶ *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) ('*Report of the Expert Panel*') xv.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* 180.

⁸⁹ *Ibid* 185.

⁹⁰ *Ibid.*

⁹¹ Anthony (n 12) 201. See also James Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2(4) *Northern Territory Law Journal* 236, 236.

⁹² Gwen Robinson and Joanna Shapland, 'Reducing Recidivism: A Task for Restorative Justice?' (2008) 48(3) *The British Journal of Criminology* 337, 337.

⁹³ Anthony (n 12) 147. See also Fernando (n 2).

⁹⁴ *Pathways to Justice Report* (n 5) 329 [10.36]. See also Chris Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (2018) 3(1) *Journal of Global Indigeneity* article 4, 10.

⁹⁵ See Stobbs and Mackenzie (n 21) 101, quoting Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper* (Project No 96, 2008) 8.

⁹⁶ Elena Marchetti, 'Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations' (2017) 28(3) *Current Issues in Criminal Justice* 257, 261.

closure where the results are less than satisfactory.⁹⁷ For example, in 2015 Western Australia abolished two sentencing court systems, the Geraldton Bandimalgu Court, which specialised in family violence offences, and the Kalgoorlie Community Court.⁹⁸ The former was abolished following ‘a 2014 evaluation that found that while rates of reoffending were lower, the difference was not statistically significant’.⁹⁹ However, ‘the Kalgoorlie Community Court was abolished following an evaluation that found that recidivism rates were higher than in mainstream courts’.¹⁰⁰ The ALRC noted that in 2012 the Queensland Murri Court system was temporarily abolished due to its failure to reduce recidivism rates.¹⁰¹

Criticisms of ISCs with respect to offender recidivism rely foremost on empirical data and positivist metrics.¹⁰² A study of the Nowra Circle Court

cautioned against the accuracy of an exclusive statistical or qualitative analysis of rates of recidivism. It advocated for a mix of qualitative and statistical data, to get a better understanding of recidivism on the basis that ‘desistance from offending’ is an uneven process.¹⁰³

Marchetti has proposed evaluating ISCs through a range of metrics, whereby recidivism is viewed ‘as just one measure of success’ among others.¹⁰⁴ Anthony has argued that the focus on metrics like reduced recidivism, deterrence and community protection construe Indigeneity ‘as a risk factor’.¹⁰⁵ Thus, seemingly neutral research metrics might also be seen as tools of the dominant institution to entrench its dominance.¹⁰⁶ For ISCs to be properly evaluated in a way that truly reflects their purposes, attention should instead be paid to how measures and their respective methods could ‘reflect Indigenous-centric values and knowledges’.¹⁰⁷ As Marchetti has written, ISCs may be ‘achieving outcomes’ that are not measured by ‘policy-driven evaluations’.¹⁰⁸ These might include other aims outlined in the ALRC report, such as ‘increased attendance rates, and “... better and more culturally relevant sentencing process”’.¹⁰⁹

F *Restorative Justice Deprioritises the Post-Colonial Objectives of Aboriginal People*

ISCs espouse qualities associated with remediating the longstanding legacies of colonialism, including: reducing Indigenous incarceration; providing opportunities for governments to respond to the Royal Commission into Aboriginal Deaths in Custody; and complementing formal arrangements, such as former Aboriginal

⁹⁷ Ibid.

⁹⁸ *Pathways to Justice Report* (n 5) 330 [10.36].

⁹⁹ Ibid. See also Marchetti (n 96) 261.

¹⁰⁰ *Pathways to Justice Report* (n 5) 330 [10.36].

¹⁰¹ Ibid. Note that the Queensland Murri Court was reinstated in 2016.

¹⁰² *Pathways to Justice Report* (n 5) 120 [3.72].

¹⁰³ Ibid 330 [10.36] n 71.

¹⁰⁴ Marchetti (n 96) 261.

¹⁰⁵ Anthony (n 12) 76–7.

¹⁰⁶ See generally Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 3rd ed, 2021) 67–90.

¹⁰⁷ Marchetti (n 96) 258.

¹⁰⁸ Ibid.

¹⁰⁹ *Pathways to Justice Report* (n 5) 330 [10.37].

Justice Agreements between Indigenous stakeholders and governments. Additionally, ISCs claim to offer opportunities to provide inclusive and reflective sentencing that is culturally appropriate.

Restorative justice framing places emphasis on procedural qualities such as: the *voluntary* process for the defendant; encouragement to accept responsibility for offences prior to being sentenced; prioritising open and honest discussion through the inclusion of Elders and Respected Persons; and safe and organised engagement of participants through culturally appropriate formats. However, restorative justice at a procedural level is predominantly centred on addressing the needs of victims, as demonstrated by the *Crimes (Restorative Justice) Act 2004* (ACT).¹¹⁰ The aims of ISCs are, however, arguably different to those of restorative justice, in that they are concerned with societal considerations beyond the victim, take an offender-centred approach focused on accountability to community, and give consideration to the defendant's circumstances.

The restorative justice paradigm limits the extent to which the necessary 'structural shifts'¹¹¹ can take place to bring about 'a cultural and political transformation of the law' to empower Indigenous communities in the justice process.¹¹² The 'transformative approach' to justice,¹¹³ first articulated by Fraser and described by Anthony, is intrinsically part of a broader discussion concerning the 'post-colonial' goals of Indigenous peoples.¹¹⁴ Restorative justice framing positions these goals outside of orthodox sentencing and justice considerations, and reinforces settler-colonial objectives through the use of narrow evaluative metrics and targets. In this mode, reducing offender recidivism becomes the dominant "rationale for the use of specialist Aboriginal courts".¹¹⁵ As a result, ISC outcomes are unfairly evaluated against the backdrop of mainstream sentencing processes. Empirical and positivist metrics of recidivism rates constitute a narrow evaluative measure of ISC efficacy and position Indigeneity to be viewed through a lens of risk.¹¹⁶ This ignores broader 'post-colonial' aims associated with the formation of ISCs, including empowering Indigenous communities within the justice process.¹¹⁷

III Deliberative Democratic Theory

Deliberative democracy, a multi-modal theory, with a so-called 'normative core',¹¹⁸ has been applied in a range of other research contexts to analyse both micro and macro deliberation. Central to its inquiry, the theory asks *why* and *how* a site or forum should be accepted as legitimate by its participants. The theory provides

¹¹⁰ See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) (n 58) ss 6(a), (c).

¹¹¹ Anthony (n 12) 201.

¹¹² Marchetti and Daly (n 3) 415.

¹¹³ Anthony (n 12) 201. See also Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 (Jul/Aug) *New Left Review* 68, 82.

¹¹⁴ Anthony (n 12) 203.

¹¹⁵ *Pathways to Justice Report* (n 5) 329 [10.35] quoting Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders* (Federation Press, 2016).

¹¹⁶ Anthony (n 12) 21, 195.

¹¹⁷ *Ibid* 76–7, 202.

¹¹⁸ James Bohman, 'Realizing Deliberative Democracy as a Mode of Inquiry: Pragmatism, Social Facts, and Normative Theory' (2004) 18(1) *The Journal of Speculative Philosophy* 23, 25.

criteria capable of evaluating the processes, outcomes and substance of institutions like ISCs both as discrete decision-making sites and as institutions concerned with broader societal change. To examine whether deliberative democracy can be applied as an evaluative framework in relation to the efficacy and value of ISCs, we must first define the broader concept of deliberative democracy, consider why the theory is an appropriate organising framework, and finally examine whether it is capable of application in a justice system context.

A *Defining ‘Deliberative Democracy’*

Deliberative democracy, as defined by Gutmann and Thompson, is a framework through which decisions and policies made within a democracy are justified because they are agreed through a process of ‘discussion among free and equal citizens or their accountable representatives’.¹¹⁹ *Deliberation* in the context of a ‘deliberative democracy’ refers to a ‘distinctive communicative practice’ involving ‘reason-giving and mutual justification’ or reciprocity.¹²⁰ This reason-giving process requires a ‘transmission of ideas, proposals, and discourses’¹²¹ and ‘no force except that of the better argument is [to be] exercised’.¹²² Beyond this core meaning, deliberative democracy can be seen as ‘a larger, normative project’ that ‘encompasses multiple other institutions and practices’ including judicial systems.¹²³ The relationship between theories of deliberative democracy and legal systems is, as Levy and Orr argue, ‘reflexive’ in nature.¹²⁴ Two interconnected questions surround this relationship: first, ‘how [the] law [in question] shapes, enables, or constrains deliberation’; and second, ‘how deliberation shapes law, whether by generating new regulatory models or understandings, or reinforcing existing rules and their interpretation’.¹²⁵

B *Should Deliberative Democracy Theory Be Applied to Indigenous Sentencing Courts?*

1 *Why Deliberative Democracy?*

ISCs are deliberative sites because of the nexus existing between the collective deliberation of Elders and the Magistrate and the resultant sentencing decision. ISCs should be analysed in respect of their deliberative qualities as there is a notable lack of scholarship in this area. McCaul, among others, has argued that historically Indigenous participation ‘in decision-making in Australia is ... denied, ignored, or

¹¹⁹ Amy Gutmann and Dennis Thompson, ‘Why Deliberative Democracy is Different’ (2000) 17(1) *Social Philosophy and Policy* 161, 161.

¹²⁰ André Bächtiger and John Parkinson, *Mapping and Measuring Deliberation: Towards a New Deliberative Quality* (Oxford University Press, 2019) 21.

¹²¹ Mary F Scudder, Selen A Ercan and Kerry McCallum, ‘Institutional Listening in Deliberative Democracy: Towards a Deliberative Logic of Transmission’ (2021) 43(1) *Politics* 38, 39.

¹²² Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 1st ed, 2016) 21, quoting Jürgen Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism’ (1995) 92(3) *Journal of Philosophy* 109, 124.

¹²³ Scudder, Ercan and McCallum (n 121) 39.

¹²⁴ Levy and Orr (n 122) 195.

¹²⁵ *Ibid.*

partial at best'.¹²⁶ According to McCaul, deliberative engagement between Indigenous peoples and the State is 'under-theorised' and 'therefore largely absent in the literature of deliberative democracy'.¹²⁷

Deliberative democracy is positioned to resolve asymmetries or incommensurability between dominant non-Indigenous law and Indigenous laws because the theory recognises different models and practices of democracy.¹²⁸ In order to do so, we should consider deliberative democracy's relevance to institutional design, and how it can be used to level the playing field.¹²⁹ When informed by deliberative democratic values, appropriately designed ISC institutions might serve to empower Indigenous communities in the justice system, by including Elders in the decision-making process where they have, in the past, been excluded. From a design perspective, 'community based deliberative spaces', a description that ISCs in some ways might be able to meet, 'may offer ... insights into democratisation processes "from below" that are more participatory than representative forms of democracy' because social relations are based on 'Indigenous notions of reciprocity and exchange, rather than competition'.¹³⁰

2 *Should Deliberative Democracy Be Understood as a Philosophy Rooted in Western Philosophical Tradition?*

Banerjee has argued that 'Enlightenment reasoning and philosophies of history provided an intellectual justification of more than two hundred years of colonialism'.¹³¹ He points to deliberative democracy's 'quest for consensus' which, he claims, ignores 'legacies of colonialism and structural inequalities that persist in contemporary societies'.¹³² Recent scholarship shows that deliberative democracy scholars are alive to critical discussions concerning colonialism.¹³³ Ihawoh highlights that examples of deliberative and consensus-based decision-making are evident across cultures and societies.¹³⁴ In this regard, the normative principles of deliberative democracy are not, and should not, be understood as part of a dominant

¹²⁶ Justin McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' in Hans Asenbaum and Friedel Marquardt (eds), 'Can Deliberative Democracy Be Decolonized? A Debate' (Working Paper Series No 2024/01, Centre for Deliberative Democracy and Global Governance, University of Canberra, 2024) 8, 8.

¹²⁷ Ibid 10.

¹²⁸ See, eg, Martin Hébert, 'Indigenous Spheres of Deliberation' in Andre Bächtiger, John S Dryzek, Jane Mansbridge and Mark Warren (eds) *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 100. Cf Subhabrata Bobby Banerjee, 'Decolonizing Deliberative Democracy: Perspectives from Below' (2022) 181(2) *Journal of Business Ethics* 283, 296. See also Anthony (n 12) 69.

¹²⁹ Archon Fung, 'Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences' (2003) 11(3) *Journal of Political Philosophy* 338, 344.

¹³⁰ McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' (n 126) 10.

¹³¹ Banerjee (n 128) 286.

¹³² Ibid 284.

¹³³ See generally Hans Asenbaum and Friedel Marquardt (eds), 'Can Deliberative Democracy Be Decolonized? A Debate' (Working Paper Series No 2024/01, Centre for Deliberative Democracy and Global Governance, University of Canberra, 2024).

¹³⁴ Bonny Ihawoh, 'Decolonizing Deliberative Democracy: Four Possible Approaches' in Hans Asenbaum and Friedel Marquardt (eds), 'Can Deliberative Democracy Be Decolonized? A Debate' (Working Paper Series No 2024/01, Centre for Deliberative Democracy and Global Governance, University of Canberra, 2024) 14, 14.

western paradigm.¹³⁵ Instead, it has been said that the scholarship surrounding deliberative democracy, as a theory, is intellectually hegemonic in that it is ‘dominated by West-centric frameworks, paradigms, and cases’.¹³⁶ Ibhawoh has argued that, in view of this, scholars should pay close attention to ‘the silences, omissions, and erasures of liberal democratic discourses’ and that democratic deliberation can take diverse forms.¹³⁷ For example, as Hébert has argued, ‘Indigenous deliberation and agency go hand in hand’.¹³⁸ McCaul has acknowledged deliberative democracy’s openness to de-colonial perspectives, calling for Indigenous peoples to ‘lead and formulate new theoretical and empirical work’ from the perspective and lived experience of colonized, Indigenous people living ‘under conditions of settler colonialism’.¹³⁹

Another critique in respect of deliberative democracy’s application is that the Australian justice system, in its present form, undermines and nullifies the cultural and spiritual values of Indigenous peoples through ‘state power and regulation’,¹⁴⁰ requiring a re-imagined justice system ‘not defined by Eurocentric modernity’.¹⁴¹ This ‘hegemonic domination’, Banerjee has argued, limits ‘open access, participation and social equality’.¹⁴² Banerjee claims that deliberative democracy theory lacks a ‘sophisticated analysis of power’; or alternatively, that its analysis of power is nuanced, because it acknowledges and accepts a level of ‘coercive power’ within deliberative practice.¹⁴³ Other scholars have made convincing arguments for deliberative democracy’s applicability in the face of coercive power. For example, Valadez has argued that deliberative democracy functions as an appropriate analytical theory in ‘societies burdened with asymmetries in power between ethnocultural groups’,¹⁴⁴ such as in the Australian context. Valadez highlights deliberative democracy’s focus on mutual understanding, inclusive public discourse, and achieving outcomes through rational persuasion, not force.¹⁴⁵ In this article, I argue that deliberative democracy presents a mode capable of reimagining the justice system’s priorities, and may, in the same way contemplated by McCaul, lead to an opening up of ‘deliberative space for greater engagement with the state and Indigenous governance’ and potentially overcome the limitations of ‘existing structures of representative democracy’.¹⁴⁶ Levy, O’Flynn and Kong have suggested that it is a primary goal of deliberative democracy to find ‘consensus between majority and minority groups’¹⁴⁷ and, as such, the inclusion of ‘minority group

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid 15.

¹³⁸ Hébert (n 128) 100, 108.

¹³⁹ McCaul, ‘Deliberative Democracy Must First Engage with Settler Colonialism’ (n 126) 9.

¹⁴⁰ Banerjee (n 128) 292.

¹⁴¹ Ibid 289. See also 290–92.

¹⁴² Ibid 285.

¹⁴³ Ibid.

¹⁴⁴ Jorge M Valadez, ‘Deliberation, Cultural Difference, and Indigenous Self-Governance’ (2010) 19(2) *The Good Society* 60,62.

¹⁴⁵ Ibid.

¹⁴⁶ Justin McCaul, ‘Caring for Country as Deliberative Policymaking’ in Nikki Moodie and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023) 51, 67.

¹⁴⁷ Ron Levy, Ian O’Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 2021) 117.

voices' within a deliberative site takes on 'special salience' in demonstrating the site's legitimacy as a true deliberative institution.¹⁴⁸

C *Analysing Indigenous Sentencing Courts as Decision-Making Sites*

Deliberative democracy provides a set of criteria to examine specialist court institutions like ISCs from both micro and macro perspectives.¹⁴⁹ ISCs, when understood as micro-scale, discrete decision-making institutions, are in the Foucauldian sense 'governmentalities'¹⁵⁰ in that 'decisions are devolved' to be made by themselves.¹⁵¹ It is the observable nexus between the 'collective deliberation' (in this case, the deliberation between Elders and the Judge at each hearing, albeit limited by legislative constraints) and the decision-making process (the sentencing decision) that make ISCs appropriate for deliberative evaluation.¹⁵²

Deliberative democracy is distinct from restorative justice in that it asks why and how an institutional site or forum, such as a court, should be accepted as legitimate, through normative and descriptive inquiry. Criticism made of the theory's utopian ideals,¹⁵³ in fact, draws into focus its greatest strength: its position to critique socially complex institutional spaces.¹⁵⁴ The theory asks whether a particular democratic site or forum demonstrates particular 'normative presuppositions of communication' or 'immanent norms', such as the site's capacity to enable free and equal communication between participants.¹⁵⁵ These norms, and other related hallmarks, become usable criteria on the basis of which a normative analysis of ISCs can take place. This approach is consistent with scholars such as Scudder, White, Owen and Smith who, among others, call for a focus less on locating a 'practice' of deliberative democracy and more on its 'normative contribution'.¹⁵⁶

Deliberative democracy's so-called 'procedural approach' asks us to query whether ISCs are, at an operational and procedural level, capable of enabling free deliberation between Elders and the Magistrate.¹⁵⁷ As Neblo has written, the approach 'attempt[s] to map the theory's key concepts into an operational form'.¹⁵⁸ However, there are also limitations with taking the procedural approach in isolation, given its lack of consideration towards 'substantive' elements, such as 'equal

¹⁴⁸ Ibid.

¹⁴⁹ Jacki Schirmer, Melanie Dare and Selen A Ercan, 'Deliberative Democracy and the Tasmanian Forest Peace Process' (2016) 51(2) *Australian Journal of Political Science* 288, 289.

¹⁵⁰ Ibid 855.

¹⁵¹ Stephen Elstub, 'Overcoming Complexity: Institutionalising Deliberative Democracy through Secondary Associations' (2007) 16(1) *The Good Society* 14.

¹⁵² Ibid 19.

¹⁵³ Ibid 14.

¹⁵⁴ Ibid.

¹⁵⁵ Robert Shelly, 'Institutionalising Deliberative Democracy' (2001) 26(1) *Alternative Law Journal* 36, 37.

¹⁵⁶ Mary F Scudder and Stephen K White, *The Two Faces of Democracy: Decentering Agonism and Deliberation* (Oxford University Press, 2023) 52–3. See also David Owen and Graham Smith, 'Survey Article: Deliberation, Democracy, and the Systemic Turn' (2015) 23(2) *Journal of Political Philosophy* 213.

¹⁵⁷ See, eg, Habermas (n 122).

¹⁵⁸ Michael A Neblo, *Deliberative Democracy between Theory and Practice* (Cambridge University Press, 2015) 35.

outcomes'.¹⁵⁹ For this reason, in this article I modify this approach and place equality and social inclusion as core normative ideals, central to the definition of 'deliberative democracy' that should be thought about in view of Dryzek's hallmarks, as discussed further in Part III(D) below.¹⁶⁰

Deliberative democratic sites must be seen to be legitimate in the eyes of the public,¹⁶¹ whereby 'those subject to a collective decision' have the 'right, ability, and opportunity... to participate in deliberation about the content of that decision'.¹⁶² Deliberative legitimacy can be conceptualised in two ways: legitimacy as created 'through deliberation' which, Böker has argued, constitutes the 'norm of legitimacy', or 'the legitimacy (or justification) of deliberation' itself.¹⁶³ Böker's approach queries 'what normative demands of legitimacy are implicit in the theory of deliberative democracy'.¹⁶⁴ Deliberative legitimacy is predicated on participants within a system 'claim[ing] their right to justification'.¹⁶⁵ Dryzek has written that institutions that have capacity for deliberation are 'more legitimate'.¹⁶⁶ The legitimacy of any deliberative site can therefore be understood in reference to its capacity for deliberation: deliberative capacity.

D *The Hallmarks of Deliberative Capacity*

According to Dryzek, deliberative capacity requires the satisfaction of key criteria, namely that the deliberation is 'authentic, inclusive, and consequential'.¹⁶⁷ Dryzek has proposed that '[a] polity with a high degree of authentic, inclusive, and consequential deliberation will have an effective deliberative system'.¹⁶⁸ These criteria indicate effective deliberative democratic sites and the 'standards of legitimacy' by which they may be evaluated.¹⁶⁹

Authentic deliberation can broadly be understood to mean deliberation that induces reflection without coercion and seeks to 'connect claims to more general principles, and exhibit reciprocity'.¹⁷⁰ Coercion, as an 'anti-deliberative' force includes the use of 'brute strength', 'the identity and status of speakers', or 'majority

¹⁵⁹ Ibid 36. See also Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

¹⁶⁰ See, eg, the approach taken in Ben Cross, 'Deliberative Systems Theory and Activism' (2021) 24(6) *Critical Review of International Social and Political Philosophy* 866, 868.

¹⁶¹ John S Dryzek, 'Democratization as Deliberative Capacity Building' (2009) 42(11) *Comparative Political Studies* 1379, 1390 ('Democratization').

¹⁶² Ibid 1381.

¹⁶³ Marit Böker, 'Justification, Critique and Deliberative Legitimacy: The Limits of Mini-Publics' (2017) 16(1) *Contemporary Political Theory* 19, 24 (emphasis in original).

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 19.

¹⁶⁶ Dryzek, 'Democratization' (n 161) 1390.

¹⁶⁷ Ibid 1382. See also Böker (n 163) 22.

¹⁶⁸ Dryzek, 'Democratization' (n 161) 1382. Note that Dryzek's use of the word 'system' predates later scholarly usage associated with 'deliberative systems theory'.

¹⁶⁹ See Chiara Valentini, 'Deliberative Constitutionalism and Judicial Review. A Systemic Approach' (2022) 47(1) *Revue: Journal for Constitutional Theory and Philosophy of Law* 103, 110. Cf Levy and Orr (n 122) 22. See further discussion on this point in Part IV(A) below.

¹⁷⁰ Dryzek, 'Democratization' (n 161) 1382. See also Böker (n 163) 22. See further Part IV(A)(2) below.

feeling’ to undermine deliberation.¹⁷¹ As Neblo has argued, achieving authentic deliberation can be seen as the means to securing ‘authentic deliberative buy-in’ for good decisions.¹⁷² When buy-in is achieved, individuals ‘recognize [decisions] as reasonable and ... embrace them as their own’.¹⁷³ This is essential for participants to feel meaningfully engaged.¹⁷⁴

Inclusive deliberation, as argued by Dryzek, is less a requirement of deliberation itself, and instead a criterion to establish deliberative *democracy*.¹⁷⁵ Being ‘inclusive’ requires that ‘a broad range of interests, ideas, and positions are permitted so that people encounter a plurality of views’.¹⁷⁶ Levy and Orr argue that

[i]nclusive decision-making can be more epistemically rigorous and can yield decisions more responsive and acceptable to a broad cross-section of citizens. Conversely, when ‘entire social perspectives – such as those of minorities or women – are excluded from the political arena’ the problematic result is ‘an impoverishment of political life’.¹⁷⁷

In the adjudicative context, courts have sought to ‘expand their democratic representativeness’ in a number of ways, such as through the inclusion of ‘*amici curiae*’ (‘friends of the court’) and ‘interveners’ in litigation processes.¹⁷⁸

Consequential deliberation requires ‘an impact on [the content of] collective decisions or social outcomes’;¹⁷⁹ in other words, consequential deliberation requires participation to lead to actual results.¹⁸⁰ The overall *consequentiality* of deliberation is concerned with both achieving quality outcomes and, from a procedural perspective, empowerment of participants in the process.¹⁸¹ A study of an Australian Citizens’ Parliament held in Canberra found that the ‘resonance of consequentiality’ among participants gave participants a feeling of an ‘empowered space’.¹⁸² That feeling is present in ISCs — through their involvement in deliberation within the space, Elders and Respected Persons have an opportunity to ‘re-establish [their] authority, reinvigorate cultural protocols and [promote] self-government’.¹⁸³

Sass and Dryzek have described the consequentiality hallmark as capable of being ‘assessed in terms of the impact of deliberative participation on collective

¹⁷¹ Ron Levy, ‘Deliberative Democracy and Political Law: The Coercion Problem’ (2014) *SSRN* 6–7 <<http://dx.doi.org/10.2139/ssrn.2490239>> (‘The Coercion Problem’).

¹⁷² Neblo (n 158) 8.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid* 89–91.

¹⁷⁵ Dryzek, ‘Democratization’ (n 161) 1382.

¹⁷⁶ Valentini (n 169) 110.

¹⁷⁷ Levy and Orr (n 122) 124 (citations omitted).

¹⁷⁸ Ron Levy, ‘Rights and Deliberative Systems’ (2022) 18(1) *Journal of Deliberative Democracy* 27, 30. See further nn 257–62 and accompanying text below.

¹⁷⁹ Valentini (n 169) 110, quoting Dryzek, ‘Democratization’ (n 161) 1382. See also John S Dryzek, ‘The Deliberative Democrat’s Idea of Justice’ (2013) 12(4) *European Journal of Political Theory* 329, 334 (‘Idea of Justice’). See also further discussion in Part IV(A)(3) below.

¹⁸⁰ Nicole Curato and Simon Niemeyer, ‘Reaching Out to Overcome Political Apathy: Building Participatory Capacity through Deliberative Engagement’ (2013) 41(3) *Politics & Policy* 355, 368.

¹⁸¹ Neblo (n 158) 37.

¹⁸² Curato and Niemeyer (n 180) 369.

¹⁸³ Kathleen Daly and Elena Marchetti, ‘Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence’ in Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 4th ed, 2012) 453.

outcomes such as public policies, but also on social norms, and on the nature of the relationships between different social groups'.¹⁸⁴ Consequential and impactful deliberation by Elders and Respected Persons in ISCs might broadly involve:

- deliberating in relation to the nature and particulars of the sentencing decision, including its duration;
- feeling they, or their community, have had a voice in the dominant state-administered justice process;
- their voice was accepted as legitimate within the process; and
- preservation of the distinctiveness and authority of Indigenous laws and customs in the face of the state justice process.¹⁸⁵

Beyond the mere procedural considerations of Dryzek's hallmarks, substantive principles such as 'basic liberty and fair opportunity' should be considered.¹⁸⁶ In the decision-making process, 'mutually justifiable reasons' form the basis of a 'mutually binding' decision or outcome.¹⁸⁷ For a Judge or Magistrate to hand down a sentencing decision that represents a mutual position of both the Elders and the Judge, it would be necessary to consider whether Elders have equal opportunity and individual liberty within the site. The inclusion of substantive principles within deliberative analysis is subject to considerable debate.¹⁸⁸ For example, to what extent should concepts of equality operate as a deliberative ideal? One may argue that equality, as a distinct hallmark of deliberation, is present where all parties have equally engaged (equality of outcome) or are capable of doing so (equality of opportunity).¹⁸⁹ However, as will be discussed, issues exist with respect to the use of equality as a measure or hallmark of deliberative legitimacy.

There are two key modes of analysis with respect to deliberative equality: 'procedural' and 'substantive' equality.¹⁹⁰ These are entangled because 'formal equality remains a controversial procedural norm in modern democracies' as it does not, in and of itself, grant 'substantive equal opportunity in terms of political influence'.¹⁹¹ Trantidis has argued that this entanglement arises out of a circularity in which 'unfair social conditions create unfair terms of political participation which, in turn, reproduce these social conditions'.¹⁹² It is argued that procedural equality requires the satisfaction of three normative conditions: unrestricted domain, anonymity, and neutrality.¹⁹³ According to Trantidis, 'formal procedural equality is

¹⁸⁴ Jensen Sass and John S Dryzek. 'Symbols and Reasons in Democratization: Cultural Sociology Meets Deliberative Democracy' (2024) 53(4) *Theory and Society* 883, 884.

¹⁸⁵ McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' (n 126) 8.

¹⁸⁶ Amy Gutmann and Dennis Thompson, 'Deliberative Democracy Beyond Process' (2002) 10(2) *The Journal of Political Philosophy* 153, 153.

¹⁸⁷ Amy Gutmann and Dennis Thompson, 'Why Deliberative Democracy is Different' (n 119) 168.

¹⁸⁸ See Jack Knight and James Johnson, 'What Sort of Political Equality Does Deliberative Democracy Require?' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997) 279.

¹⁸⁹ *Ibid* 280.

¹⁹⁰ *Ibid* 281–2.

¹⁹¹ Aris Trantidis, 'Progressive Constitutional Deliberation: Political Equality, Social Inequalities and Democracy's Legitimacy Challenge' (2022) 44(3) *Politics* 453, 456.

¹⁹² Trantidis (n 191) 454.

¹⁹³ Knight and Johnson (n 188) 283.

criticised for systematically disadvantaging certain groups such as women and minorities'.¹⁹⁴ Levy and Orr, however, propose that equality 'has a more distinctive rationale in deliberative democracy theory'.¹⁹⁵ For it to be seen as a 'tool of deliberation', we should attempt to understand it as 'broad inclusivity',¹⁹⁶ which is already included within Dryzek's three hallmarks. In this respect, for now we can dispense with an analysis of equality as its own distinct criterion, and instead revert wholly to the three hallmarks.

E *The Application of the Deliberative Democracy Framework*

1 Can Indigenous Sentencing Courts Be Understood as Deliberative Democratic Sites?

Legislators, courts and policymakers involved in the design and promotion of ISCs make claims that these court models are participatory by reason of their inclusion of Aboriginal Elders and Respected Persons. For example, The *County Koori Court Practice Note* (Vic) states that

[t]he objective of the County Koori Court is to ensure greater participation of the Aboriginal community in the sentencing process... through the role played in that process by the Aboriginal Elders or Respected Persons and others such as the County Koori Court Coordinator.¹⁹⁷

The Practice Note outlines the scope of the role of Elders and Respected Persons,¹⁹⁸ stating that during the hearing, Elders provide background on the defendant, discuss reasons for the offending behaviour,¹⁹⁹ and address the defendant regarding their behaviour's impact on the community.²⁰⁰ While circular, there is a teleological argument that ISCs, which make participatory claims, should be assessed with an aligned theoretical framework: deliberative democracy.

Some scholars have examined similar court specialist systems that they refer to as 'problem-solving' courts.²⁰¹ This description, which emphasises deficit, is inappropriate in respect of ISCs in view of the 'paternalism, assimilation and (more often) indifference' that characterise Australian Indigenous policy.²⁰² When instead understood as specialist courts, ISCs demonstrate procedural similarities to drug courts and specialist family violence courts.²⁰³ Mirchandani implores us to consider the way in which specialist court models 'transcend' therapy's focus on 'individual

¹⁹⁴ Trantidis (n 191) 454.

¹⁹⁵ Levy and Orr (n 122) 124.

¹⁹⁶ Ibid.

¹⁹⁷ *Practice Note PNCR 1-2021* (n 4) 3 [1.3].

¹⁹⁸ See, eg, *ibid* 7 [6.8], 7 [6.13].

¹⁹⁹ *Ibid* 7 [6.8].

²⁰⁰ Ibid.

²⁰¹ See, eg, Rekha Mirchandani, 'Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State' (2008) 33(4) *Law & Social Inquiry* 853, 853.

²⁰² Justin McCaul, 'Indigenous Land and Water Policy' in Sheryl Lightfoot and Sarah Maddison (eds), *Handbook of Indigenous Public Policy* (Edward Elgar, 2024) 177, 182.

²⁰³ See Catherine Spooner, Wayne Hall and Richard P Mattick, 'An Overview of Diversion Strategies for Australian Drug-Related Offenders' (2001) 20(3) *Drug and Alcohol Review* 281, 286–7.

change’ to ‘involve an agenda of social change and processes of open, rational, and ongoing deliberation’.²⁰⁴ There are similarities to what McCaul has discussed in relation to the ‘Caring for Country’ initiative,²⁰⁵ involving ‘exchanges between Aboriginal groups and the state’, which was recognisably deliberative in its ‘principles, values, and processes’ and was ‘approached not as a contest between adversaries, but a process for parties to develop mutually acceptable negotiation protocols and processes’.²⁰⁶ ISCs can also be seen as ‘new state mechanisms’ in which democratic deliberation emerges in a ‘fuller, thicker, more varied’ form.²⁰⁷

In deliberative democracy scholarship, uncertainty surrounds whether courts function as true deliberative sites within broader democratic systems.²⁰⁸ Hutt, for example, has argued that courts do not facilitate democratic deliberation as required by the theory.²⁰⁹ In Hutt’s view, deliberative democracy is not adequately placed to examine the deliberative traits of judicial systems, because ‘structural features of judicial procedures’,²¹⁰ such as their enacting legislation, restrict free deliberation by the participants.²¹¹ By contrast, Warren argued that where a system ‘*empowers inclusion, forms collective agendas and wills, and organizes collective decision capacity*’ it will count as “democratic”.²¹²

Hutt has argued that court institutional structures prevent judges and the parties from deliberating during a trial.²¹³ This, however, ignores ISCs’ unique format and their position as nested institutions within the broader judicial system, concerned primarily with sentencing and designed with dialogue between the community and the offender in mind. As previously discussed, ISCs have unique features that place them outside the mainstream judicial sentencing, including the involvement of Elders and Respected Persons in advisory capacities to the Magistrate.²¹⁴ ISCs’ unique characteristics may serve to distinguish them from the ‘institutional environment and conditions’ that hinder the deliberative capacity of mainstream judicial procedures.²¹⁵ However, Hutt’s argument underlines some of the key limitations deliberative theory faces with respect to legal institutions.

2 *Deliberative Democratic Theory as an Applied Framework*

Deliberative democratic theory faces challenges as an applied form of analysis — in particular, whether we can translate its normative ideals into ‘empirical evaluative

²⁰⁴ Mirchandani (n 201) 856.

²⁰⁵ McCaul, ‘Caring for Country as Deliberative Policymaking’ (n 146) 66.

²⁰⁶ Ibid.

²⁰⁷ Mirchandani (n 201) 885.

²⁰⁸ Donald Bello Hutt, ‘Measuring Popular and Judicial Deliberation: A Critical Comparison’ (2018) 16(4) *International Journal of Constitutional Law* 1121, 1137. See also John Ferejohn and Pasquale Pasquino, ‘Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice’ in Wojciech Sadurski (ed), *Constitutional Justice, East and West* (Kluwer Law International, 2002) 21.

²⁰⁹ Hutt (n 208) 1136.

²¹⁰ Ibid 1123.

²¹¹ Ibid 1136.

²¹² Scudder and White (n 156) 54, quoting Mark E Warren, ‘A Problem-Based Approach to Democratic Theory’ (2017) 111(1) *American Political Science Review* 39, 39 (emphasis in original).

²¹³ Hutt (n 208) 1122.

²¹⁴ Marchetti and Daly (n 3) 421.

²¹⁵ Hutt (n 208) 1122.

schemes'.²¹⁶ Hutt, for example, has argued that there are limitations in the theory's ability to examine the deliberative traits of judicial systems.²¹⁷ Hutt considers many applied theorists,²¹⁸ and suggests that deliberative democracy is not positioned to 'fully test the adequacy of its practice to its principles'.²¹⁹ Notably, he has argued that the theory cannot be empirically applied to analyse the deliberative qualities of the judiciary.²²⁰ This is due to a tendency by scholars to mistake 'dialogue and argument exchange taking place inside the courtroom' as demonstrative of deliberative democracy principles.²²¹ According to Hutt, courtroom dialogue and argument is a restricted form of deliberation, and raises questions as to whether courts are 'ideal deliberative institutions'.²²²

3 Examples of the Application of the Deliberative Democracy Framework in Related Areas

Deliberative democracy theory has been effectively applied as an analytical tool to a wide variety of institutions, processes and forums. It asks questions like 'what are the barriers to deliberation?' and can the deliberative site (subject to analysis) resolve 'intractable social or political issues'?²²³ Similar questions can be posed in respect of specialist sentencing courts like ISCs regarding both their role as institutions of social change, capable of a form of systemic deliberation within the broader justice system, and the barriers to deliberation that exist at a discrete, procedural or forum level. These questions thereby set the focus on ISCs' capacity (as discrete sites) for deliberation.

One example of deliberative democracy's analytical application includes Schouten, Leroy and Glasbergen's use of Dryzek's deliberative capacity analysis as a research strategy to examine 'private multi-stakeholder governance' regimes.²²⁴ Their case studies assessed the deliberative capacity of governance roundtables where stakeholders within a supply chain come together to address industry-wide concerns.²²⁵ They found that the roundtables fell short on 'two out of three criteria of deliberative capacity: inclusion and consequentiality' and that there was a 'lack of transmission from deliberative processes outside the [r]oundtable setting to deliberative processes within'.²²⁶

²¹⁶ Ibid 1121.

²¹⁷ Ibid 1122.

²¹⁸ See, eg, Laura W Black, Stephanie Burkhalter, John Gastil and Jennifer Stromer-Galley, 'Methods for Analyzing and Measuring Group Deliberation' in Erik P Bucy and R Lance Holbert (eds), *Sourcebook for Political Communication Research: Methods, Measures, and Analytical Techniques* (Routledge, 2013) 323.

²¹⁹ Hutt (n 208) 1122.

²²⁰ Ibid 1121.

²²¹ Ibid 1122.

²²² Ibid 1123.

²²³ Scudder and White (n 156) 20.

²²⁴ See generally Greetje Schouten, Pieter Leroy and Pieter Glasbergen, 'On the Deliberative Capacity of Private Multi-Stakeholder Governance: The Roundtables on Responsible Soy and Sustainable Palm Oil' (2012) 83 *Ecological Economics* 42. 218

²²⁵ Ibid 49.

²²⁶ Ibid.

Schirmer, Dare and Ercan adopted aspects of Dryzek's model in an examination of 'deliberative democracy and the Tasmanian forest peace process', an engagement process initiated in 2009 that led to the formation of the Tasmanian Forest Agreement.²²⁷ Five criteria were used to assess the deliberative quality of the process: access to deliberation, inclusiveness, deliberativeness, openness and transparency, and consequentiality.²²⁸ They noted that it was difficult for participatory processes to satisfy 'all five criteria of deliberative democracy equally and simultaneously'.²²⁹ The study gained insights about the process and whether it was an ideal deliberative site.²³⁰ Schirmer, Dare and Ercan called for deliberative theorists to consider 'how best to build incremental deliberative processes in which succeeding stages gradually build deliberative quality, rather than attempting to achieve all normative criteria simultaneously'.²³¹

Hébert has examined forms of deliberation by the Indigenous Me'phaa people of Mexico with respect to 'community life', 'regional organisations' and 'national and international political movements'.²³² He analysed how Me'phaa deliberation was 'multi-scalar' within these contexts and took account of community fracturing and 'scission' resulting from State administrative policies.²³³ The Me'phaa demonstrated 'consensus-making practices' that extended their political agency beyond the community-level and into systemic and global contexts.²³⁴ Hébert found there was Indigenous political agency and that Indigenous organisations played a role 'in engaging the state and affirming self-determination'.²³⁵

In 2004, Parkinson and Roche examined restorative justice through a deliberative democracy lens.²³⁶ They concluded that there were a 'number of points of contact between deliberative democracy and restorative justice' and that the latter can be seen as an 'institutional approximation' for deliberative democratic principles.²³⁷ However, their research was limited in that it did not consider specialist court institutions like ISCs.

4 *Differentiating between Deliberative Democracy's Procedural, Output and Substantive Values*

There are a number of observable alignments and differences between the procedure, substance and output of deliberative democracy theory and restorative justice theory. Restorative justice is concerned with the substantive output of decisions: namely, repairing harms caused by crimes.²³⁸ This involves an attempt to 'restore victims,

²²⁷ See generally Schirmer, Dare and Ercan (n 149).

²²⁸ Ibid 290.

²²⁹ Ibid 302.

²³⁰ Ibid.

²³¹ Ibid.

²³² See generally Hébert (n 128) 100, 105.

²³³ Ibid 102, 105.

²³⁴ Ibid 105.

²³⁵ Ibid 105–6.

²³⁶ John Parkinson and Declan Roche 'Restorative Justice: Deliberative Democracy in Action?' (2004) 39(3) *Australian Journal of Political Science* 505.

²³⁷ Ibid 506, 516.

²³⁸ Daly and Marchetti (n 183) 455, 457–9.

offenders and communities' by holding 'offenders accountable for crime in ways that are constructive, but not punitive or harsh' and reducing 'victim fear towards the offender'.²³⁹ By contrast, under deliberative democracy, the output focus is placed on achieving a sense of legitimacy of process, by asking both '*how* to achieve democratic legitimacy' and '*how* we ought to think about legitimacy'.²⁴⁰ In this sense, deliberative democracy is less concerned with the content of decisions, rather, the quality of deliberation tells us something about the quality of the outcome and the process that gave rise to the outcome.²⁴¹

Chambers has argued that at the procedural level deliberative democracy prioritises inclusive communication practices, reason-giving and equality of participation.²⁴² These procedural qualities are said to give rise to 'legitimate outcomes' for deliberative sites.²⁴³ This is in contrast to restorative justice, which favours 'the facilitation of participation and communication between the parties involved' in order to give a voice to victims, and with a view towards an agreed set of consequences that satisfy all parties.²⁴⁴ Restorative justice, while emphasising dialogue and participation in the process by offenders, victims and their supporters,²⁴⁵ gives less attention 'to the formalities of the criminal legal process or the voices of legal actors alone'.²⁴⁶ In the case of ISCs, Elder and Respected Person participation concerns communicating to the defendant the 'impact of the offence', inducing reflection or remorse, and promoting acceptance of responsibility.²⁴⁷

At a substantive level, deliberative democracy is primarily centred on the decision-making process itself and, as argued by Kanra, achieving a form of social learning by the participants.²⁴⁸ The deliberative process involves 'interaction between participants ... to develop an understanding of each other's claims'.²⁴⁹ The views of Elders and those of the Judge or Magistrate would, in an ideal ISC setting, be assessed and evaluated by each other, rather than a one-way information giving exercise.²⁵⁰ As O'Doherty has noted, achieving 'complementary goals', such as social learning, in order to produce better citizens as well as better (social) decisions has been contemplated by a number of scholars.²⁵¹

²³⁹ Ibid.

²⁴⁰ Scudder and White (n 156) 24 (emphasis in original).

²⁴¹ See generally *ibid* 22, 25.

²⁴² Simone Chambers, 'Deliberative Democracy and the Digital Public Sphere: Asymmetrical Fragmentation as a Political Not a Technological Problem' (2023) 30(1) *Constellations: An International Journal of Critical and Democratic Theory* 61, 62.

²⁴³ Scudder and White (n 156) 22.

²⁴⁴ Tinneke Van Camp and Jo-Anne Wemmers, 'Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117, 118.

²⁴⁵ Daly and Marchetti (n 183) 455, 456–7.

²⁴⁶ Ibid.

²⁴⁷ Ibid 461.

²⁴⁸ Bora Kanra, 'Binary Deliberation: The Role of Social Learning in Divided Societies' (2012) 8(1) *Journal of Deliberative Democracy* article 1, 2.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Kieran C O'Doherty, 'Synthesising the Outputs of Deliberation: Extracting Meaningful Results from a Public Forum' (2013) 9(1) *Journal of Deliberative Democracy* article 8, 2.

IV Indigenous Sentencing Courts as Deliberative Institutions

For the deliberation between Elders and sentencing judges to be legitimate, participation must be inclusive, authentic and consequential. These hallmarks can be understood as measures of ‘relational processes’.²⁵² Fundamental to self-determination, Hébert has argued that ‘Indigenous deliberation and agency go hand in hand’.²⁵³ Hébert argued that the repression and short-circuiting of relational processes and ‘undermining the particular forms of authority that operate within them’ are indicative of coloniality.²⁵⁴ By bringing ISCs within a deliberative democracy framework, these relational processes can be prioritised. While I have not sought, in this article, to quantify these participatory metrics, ISCs are deliberative sites that are capable of offering a level of inclusive, authentic and consequential deliberation. As such, an affinity exists with deliberative democracy in a way that is absent within a paradigm strictly focused on restorative justice. In this respect, deliberative democracy can, and should, be applied to ISCs as an evaluative framework to determine whether they are legitimate deliberative forums.

A *The Deliberative Relationship Between Participants in the ISC Process: Elders, Respected Person and Magistrates*

Dryzek and Niemeyer have both argued that we can think about a deliberative site’s impact in terms of the extent to which the forum enables deliberation, rather than its capacity to reach a decision.²⁵⁵ To do this, we return to the three deliberative hallmarks proposed by Dryzek and consider to what degree the law surrounding ISCs shapes, enables, or constrains these qualities.²⁵⁶

1 *Inclusive Deliberation*

From a conventional court perspective, the nature and formality of stakeholder expression is constrained by the legal rules governing court processes, requiring views to be presented by way of oral or written submissions. Courts have mechanisms that allow for inclusive participation: *amici curiae*²⁵⁷ and interveners.²⁵⁸ After seeking leave, these third parties may be permitted to file submissions to assist the court in resolving a point of fact or law where it is ‘in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer’.²⁵⁹ Williams highlights ‘the long history of [*amici curiae*] being used by the judiciary to overcome the shortcomings

²⁵² Hébert (n 128) 108.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Dryzek, ‘Idea of Justice’ (n 179) 333. Note also the distinction between ‘decision-making’ and ‘deliberation-making’ in Simon Niemeyer, ‘Scaling Up Deliberation to Mass Publics: Harnessing Minipublics in a Deliberative System’ in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (Rowman & Littlefield Publishers, 2014) 177, 179.

²⁵⁶ Levy and Orr (n 122) 195; Dryzek, ‘Democratization’ (n 161) 1382.

²⁵⁷ Levy, ‘Rights and Deliberative Systems’ (n 178) 30.

²⁵⁸ *Ibid.*

²⁵⁹ *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 312 (French CJ).

of the adversarial model of litigation'.²⁶⁰ This intervention 'can enhance "the legitimacy of the court's decision particularly in those cases raising fundamental social and moral questions"'.²⁶¹ In this respect, conventional court processes exhibit inclusive elements that are capable of promoting 'underserved interests to find entry into public decision-making'.²⁶²

The role of Elders and Respected Persons in sentencing might, in many ways, be seen as an expansion of the curial process, without the structural constraints associated with amici curiae participation, in that they are able to openly share their views with the court and participate in the process. ISC laws adopt a language of inclusivity within their mission objectives and statutory provisions, however, these same laws limit the extent to which Elders and Respected Persons may be included and their views considered by the presiding Magistrate or Judge in reaching a sentencing decision.²⁶³ Drawing upon the amici curiae example, policymakers could expand the range of issues on which Elders and Respected Persons may deliberate, and find ways to give greater weight to their contribution in order to address counter-majoritarian concerns about judicial power.²⁶⁴

Listening to stakeholders is essential for inclusive deliberation.²⁶⁵ Burgess, Grice and Wood have argued that Aboriginal leading practices are 'founded on deep listening, reciprocity, and respect'.²⁶⁶ Bobongie-Harris, Hromek and O'Brien have written that within Aboriginal cultures, 'listeners of the story [have] as much responsibility to and for the story as the story-teller'.²⁶⁷ The extent to which a participant, Elder or Respected Person is truly listened to is related to the extent to which they are included in the deliberative process. Aboriginal Elders and Respected Persons are leaders in their communities and therefore the extent to which this is recognised within an ISC may reflect its overall deliberative character.

Defendants involved in the Victorian Koori Court have spoken of its *inclusive* qualities for them as parties to the proceeding.²⁶⁸ They have noted that Elders 'contribute to the sentencing discussion, bringing their knowledge of community culture, values and kinship'.²⁶⁹ Furthermore, Elders 'directly engage the [a]ccused' and foster 'community participation in the delivery of justice' and 'may also speak

²⁶⁰ George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 367.

²⁶¹ Ibid.

²⁶² Levy, 'Rights and Deliberative Systems' (n 178) 30.

²⁶³ See, eg, Magistrates' Court (Koori Court) Bill Second Reading (n 44) 1283.

²⁶⁴ Williams (n 260) 367.

²⁶⁵ Francis Bobongie-Harris, Danièle Hromek and Grace O'Brien, 'Country, Community and Indigenous Research: A Research Framework That Uses Indigenous Research Methodologies (Storytelling, Deep Listening and Yarning)' (2021) (2) *Australian Aboriginal Studies* 14, 18.

²⁶⁶ Catherine Burgess, Christine Grice, and Julian Wood, 'Leading by Listening: Why Aboriginal Voices Matter in Creating a World Worth Living In' in Kristin Elaine Reimer, Mervi Kaukko, Sally Windsor, Kathleen Mahon, Stephen Kemmis (eds) *Living Well in a World Worth Living in for All, Volume 1: Current Practices of Social Justice, Sustainability and Wellbeing* (Springer, 2023) 115, 115.

²⁶⁷ Bobongie-Harris, Hromek and O'Brien (n 265) 18.

²⁶⁸ Zoë Dawkins, Martyn Brookes, Katrina Middlin and Paul Crossley, *County Koori Court of Victoria: Final Evaluation Report* (County Court of Victoria and the Department of Justice (Vic), September 2011) 25 ('County Koori Court Final Evaluation Report').

²⁶⁹ Ibid 9.

directly to the [a]ccused about their behaviour and its effect upon the community'.²⁷⁰ Through this role, Elders have been able to 'provide information on the background of the [a]ccused and possible reasons for the offending behaviour'.²⁷¹ Elders explain to the Magistrate or Judge the kinship and family connections, advise on cultural practices and protocols, and provide their 'perspectives relevant to sentencing'.²⁷²

Communication, for it to be inclusive, must be understood by both the giver and receiver of information. Unsurprisingly, there are notable language barriers for Aboriginal speakers engaged in court processes.²⁷³ It has been noted in the Northern Territory context that 'Elders communicated in their Indigenous language to the offender'.²⁷⁴ The Koori Court has sought to minimise miscommunication through 'the use of plain English'.²⁷⁵ To date, scholarship has largely been confined to the effects of miscommunication 'between Indigenous offenders and legal professionals', however further research is needed in relation to the linguistic impact on Elders and Respected Persons deliberating with judges.²⁷⁶

2 *Authentic Deliberation and Deliberative Buy-In*

Authentic deliberation 'induces reflection' without coercion.²⁷⁷ Reflection is defined broadly as 'a fixing of the thoughts on something; careful consideration', 'a thought occurring in consideration or meditation', and 'the casting of some imputation or reproach'.²⁷⁸ Coercion refers to structures or practices antithetical to rational forms of deliberation.²⁷⁹ Elders and Respected Persons who take part in ISCs are subject to coercion through the legal rules that structure their deliberations;²⁸⁰ that is, they are subject to the statutory authority exercised by the Magistrate or Judge presiding over the hearing.²⁸¹ In most ISC jurisdictions, Elders and Respected Persons are, in effect assuming, 'advisory' positions to the Magistrate or Judge who retains all sentencing discretion.²⁸² Whether, and to what extent, the views of Elders or Respected Persons are taken into account is ultimately at the discretion of the presiding magistrate and therefore, the authenticity of deliberation between the Elders or Respected Persons and the Magistrate may be seen to be diminished. The limited scope of participation raises questions as to whether the laws governing ISCs enable what Neblo describes as deliberative 'buy-in'.²⁸³ This goes to the heart of

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Natalie Stroud, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010) 18(3) *Australian Law Librarian* 184, 185.

²⁷⁴ Blagg and Anthony (n 28) 260.

²⁷⁵ Stroud (n 273) 189.

²⁷⁶ Ibid 184. See also Blagg and Anthony (n 28) 260.

²⁷⁷ Valentini (n 169) 110, quoting Dryzek, 'Democratization' (n 161) 1382.

²⁷⁸ *Macquarie Dictionary* (online at 17 February 2025) 'reflection' (defs 5, 6, 8).

²⁷⁹ See generally Levy, 'The Coercion Problem' (n 171).

²⁸⁰ Ibid 8.

²⁸¹ See, eg, *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) para 1(b).

²⁸² Elders in the Victorian Koori Court discuss the impact of the defendant's offending behaviour on their community and play a support role in respect of the defendant and victim: see *County Koori Court Final Evaluation Report* (n 268) 9.

²⁸³ Neblo (n 158) 89–91.

whether the common voice²⁸⁴ of Elders and Respected Persons is in fact meaningfully represented as part of the ISC process. Acknowledging the ‘coercive power’ of the laws governing ISCs, policymakers should consider the overall procedural design of ISCs and whether their design marginalises, includes or constrains deliberation by certain stakeholders.²⁸⁵

3 *Consequential Deliberation*

For deliberation to be ‘consequential’ there must be an ‘impact’ upon ‘collective decisions or social outcomes’.²⁸⁶ As such, the participation of Elders must in turn ‘lead to actual results’.²⁸⁷ Some scholars, such as Blagg and Anthony, have argued for a greater jurisdictional remit for ISCs as opposed to them being used in an ‘ad-hoc manner’ at the ‘discretion of the Magistrate’.²⁸⁸ Across Australia, ISCs do not presently

provide authority to the Elders to determine the sentence. Rather, they provide advice to the sentencing Judge or Magistrate, drawing on the Indigenous community’s expectations and awareness of appropriate avenues, programs and supports for the individuals involved and their families. Ultimately, the magistrate or judge determines the sentence and the extent to which the views of Elders are taken into account, if at all. This is regarded by certain Elders, [within] the Yolŋu and Warlpiri communities as an inadequate model given the ‘continuing relevance of Indigenous Laws to their lives and the role of Elders in relation to the mostly younger offenders’.²⁸⁹

Cunneen has argued that ISC deliberations have ‘been typified as power-sharing arrangements’²⁹⁰ and noted that cooperation from Indigenous participants relies upon the community having ‘confidence that the power-sharing arrangements will be honoured’.²⁹¹ Under the *Magistrates’ Court Act 1989* (Vic) s 4G(2), the Koori Court ‘*may* consider any oral statement made to it by an Aboriginal elder or respected person’ (emphasis added). Similar discretion afforded to the Magistrate or Judge is also reflected in ISC legislation in both Queensland and the ACT.²⁹² Appleby and colleagues have highlighted how the principles elucidated in *Kable v Director of Public Prosecutions* (‘*Kable*’) create constitutional implications for ISCs that limit the extent judicial power can be delegated to Elders or Respected

²⁸⁴ See generally *ibid* 2–4.

²⁸⁵ *Ibid* 14.

²⁸⁶ Valentini (n 169) 110, quoting Dryzek, ‘Democratization’ (n 161) 1382.

²⁸⁷ Curato and Niemeyer (n 180) 368.

²⁸⁸ Blagg and Anthony (n 28) 260. See also George Pascoe Gaymarani, ‘An Introduction to the Ngarra Law of Arnhem Land’ (2011) 1(6) *Northern Territory Law Journal* 283, 299.

²⁸⁹ Blagg and Anthony (n 28) 260.

²⁹⁰ Cunneen, ‘Sentencing, Punishment and Indigenous People in Australia’ (n 94) 11, citing Ivan Potas, Jane Smart, Georgia Bignell, Brendan Thomas and Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales and Aboriginal Justice Advisory Committee, October 2003).

²⁹¹ Cunneen, ‘Sentencing, Punishment and Indigenous People in Australia’ (n 94) 11, citing Potas et al (n 290) 4.

²⁹² See, eg, *ACT Practice Direction No 2 of 2024* (n 7) paras 34(c), 37(c); *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) paras 1(b), (3).

Persons.²⁹³ Should influence over judicial decisions be given to Elders and Respected Persons — for example, through legislative amendments to diminish the discretionary power of judicial officers or alternatively through the direct empowerment of Elders and Respected Persons — ISCs run the risk of being inconsistent with *Kable* principles and Chapter III of the *Australian Constitution*.²⁹⁴ *Kable* held that the institutional integrity and independence of courts cannot be impaired by state legislation.²⁹⁵ These constitutional limitations determine the extent to which judicial power can be reshaped within ISCs.²⁹⁶ In this respect, the laws governing ISCs currently constrain the extent of participation by Elders, irrespective of any perception of consequential deliberation.

The *County Koori Court Final Evaluation Report* noted reflections of participants in the Court on the input from Elders and Respected Persons.²⁹⁷ One defendant ‘discussed the feeling of being reprimanded by the Elders’, noted that the Elders contributed to ‘a better understanding of [their] past and reasons for current offending’, and ‘commented on the respectful atmosphere of the sentencing discussion, and how this facilitated a problem-solving approach to their offending and resulted in punishment that they are more likely to engage in and respond to’.²⁹⁸ The Report identified soft examples of consequentiality, whereby the presence of Elders and Respected Persons had an ‘impact’ on the accused’s understanding, and perhaps greater amenability towards the legitimacy of the sentencing and ISC process.²⁹⁹ While these non-curial forms of consequential engagement are present, truly consequential deliberation, in respect of sentencing outcome, is ultimately constrained by legislative and constitutional imperatives. In this way, ISC models appear presently to lack true deliberative legitimacy for Elder and Respected Person participants.

B *Fostering Communication between Legal Systems*

Deliberative democracy is said to promote a ‘sensitivity to difference and disagreement’ in democracy.³⁰⁰ By creating an environment in which persuasion can be used to ‘reach common ground’,³⁰¹ ISCs may provide an empowered space where Indigenous people may develop or repurpose new ‘deliberative practices’ within the colonial context,³⁰² similar to how Indigenous groups have demonstrated resilience to settler-colonial States in other jurisdictions.³⁰³

²⁹³ Gabrielle Appleby, Anna Olijnyk, John Williams and James Stellios, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021) 141, citing *Kable v DPP (NSW)* (1996) 189 CLR 51 (*‘Kable’*).

²⁹⁴ Appleby et al (n 293) 141.

²⁹⁵ *Kable* (n 293) 107 (Gaudron J), 118 (McHugh J), 132 (Gummow J).

²⁹⁶ *Ibid.* See also Appleby et al (n 293) 141, where it is argued that ‘there has not been any constitutional challenge to [these] specialist courts in Australia ... [as these] courts operate by consent’.

²⁹⁷ *County Koori Court Final Evaluation Report* (n 268).

²⁹⁸ *Ibid.* 44.

²⁹⁹ See, eg, *ibid.* 33.

³⁰⁰ Scudder and White (n 156) 20.

³⁰¹ Levy, ‘The Coercion Problem’ (n 171) 8.

³⁰² Hébert (n 128) 101.

³⁰³ *Ibid.*

Gutmann and Thompson have claimed that deliberative democracy framing cannot “‘make incompatible values compatible, but it can help participants recognize moral merit in their opponents’ claim”, and achieve a shared sense of legitimacy’.³⁰⁴ In this sense, a deliberative democratic framing may serve to promote commensurability between non-Indigenous and Indigenous justice practices by fostering intercultural dialogue.³⁰⁵ This may lead to the generation of ‘new regulatory models or understandings’.³⁰⁶ The understandings or legal interpretations arrived at through deliberation may promote recognition of Indigenous legal systems and thus serve to generate commensurability or ‘interlegality’ between systems.³⁰⁷ Where ISCs are able to offer legitimate deliberation to stakeholders that is seen to be authentic, inclusive and consequential, broader power imbalances and the incommensurability between Indigenous law and dominant non-Indigenous law may, to an extent, resolve. From this inter-system level, the deliberative hallmarks function to prioritise ‘meaningful communication’ and ‘mutual recognition’ between cultures.³⁰⁸

In turn, this may work towards decolonising ‘institutional patterns of Indigenous subordination’³⁰⁹ by creating forms of ‘hybrid justice’ that include ‘inter-cultural’ dialogue.³¹⁰ These ‘hybrid’ forms of justice contrast the binary models of retributive and restorative justice.³¹¹ The promotion of ‘inter-cultural’ dialogue allows for Indigenous aims and objectives to be furthered against the backdrop of ‘criminal justice apparatus of the Global North’.³¹² Hybrid justice, achieved through prioritising legitimate deliberation, decentres colonial legal authority to invoke ‘Indigenous place-based and place-centred justice, including’ in the ‘process of generating these spaces’.³¹³

Interlegality describes the ‘porosity’ in legal systems that makes them amenable to difference and ‘cross-cultural penetration’.³¹⁴ In 1997, Drummond examined the legal pluralism between Canadian State justice processes and the laws of Inuit people.³¹⁵ Proulx has argued that Drummond’s work identifies the means by which interlegality occurs. This sees communication and dialogue between ‘Aboriginal and non-Aboriginal legal systems’ as essential to the incorporation of ‘distinctive and unfamiliar [laws and practices] into the familiar’.³¹⁶ Interlegality

³⁰⁴ Schirmer, Dare and Ercan (n 149) 289–90, quoting Gutmann and Thompson, *Why Deliberative Democracy?* (n 159) 11.

³⁰⁵ See generally Paul Healy, ‘Overcoming Incommensurability through Intercultural Dialogue’ (2013) 9(1) *Cosmos and History: The Journal of Natural and Social Philosophy* 265, 265–6, 274.

³⁰⁶ Ibid.

³⁰⁷ Craig Proulx, ‘Blending Justice: Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System’ (2005) 37(51) *The Journal of Legal Pluralism and Unofficial Law* 79, 81, 83.

³⁰⁸ Healy (n 305) 266.

³⁰⁹ Anthony (n 12) 203.

³¹⁰ Blagg and Anthony (n 28) 246.

³¹¹ Proulx (n 307) 83. See also Kathleen Daly, ‘Restorative Justice: The Real Story’ (2002) 4(1) *Punishment & Society* 55, 66.

³¹² Blagg and Anthony (n 28) 246.

³¹³ Ibid 247. See also Hajiali Sepahvand, ‘Hybridity as Instrument of Decolonization in Herman Melville’s *Moby Dick*’ (2012) 2(5) *Theory & Practice in Language Studies* 895, 898.

³¹⁴ Proulx (n 307) 81.

³¹⁵ See generally Susan G Drummond, *Incorporating the Familiar: An Investigation into Legal Sensibilities in Nunavik* (McGill-Queen’s University Press, 1997).

³¹⁶ Proulx (n 307) 81, citing Drummond, *ibid* 22–3.

therefore can be seen as the end result of effective dialogue, and as such, a product of deliberation. Cunneen has suggested that where Indigenous law and dominant non-Indigenous law coalesce ‘a type of postcolonial hybridity’ may emerge ‘where institutional processes are changed and the outcome is *neither* an Indigenous process nor the dominant non-Indigenous legal process’.³¹⁷ Similarly, Blagg and Anthony argue that ISCs ‘carved out’ these ‘hybrid spaces’ within the mainstream sentencing system.³¹⁸ ISCs therefore have capacity to ‘unsettle non-Indigenous authority in sentencing through enlivening Indigenous standpoints’.³¹⁹

By achieving hybrid justice, ‘sentencing — as a site of punishment, rehabilitation and integration’ may be able to ‘do more than further objectives of state law and order, and instead augment Indigenous social orders’.³²⁰ Hybridity between systems may ‘shift the gaze’ from sentencing alone towards challenging the ‘legal traditions, discourses and [criminal justice] processes’ of the Global North.³²¹ Hybridity may also lead to an emergence of interlegality, whereby the ideas, philosophies and practices of Aboriginal peoples may be able to penetrate, and lead to a change of mainstream justice systems.³²² Likewise, opposing systems of law could incorporate ‘each other’s “socially legitimate sense of limits” and each other’s sense of injustice into their justice/legal spheres’.³²³ In this way, where a legitimate deliberation within a forum results in a hybrid justice outcome, new ‘spaces for a negotiation between the laws of the settler state and Indigenous nations’ may emerge.³²⁴ This may serve to ‘reinvigorate Indigenous legal and cultural values relating to the authority of Elders, respect for Indigenous Knowledges and holistic and collective responses to individual needs’.³²⁵

V Conclusion

ISCs were introduced to reduce Indigenous incarceration, provide opportunities for governments to respond to the Royal Commission into Aboriginal Deaths in Custody, and complement various justice agreements between Indigenous stakeholders and governments. They offer opportunities to provide inclusive and reflective sentencing that is culturally appropriate. They have been characterised as restorative justice processes — by virtue of their voluntary nature, focus on accepting responsibility prior to sentencing, and encouragement of open and honest communication — but the restorative justice framework does not capture the broader goals of Indigenous peoples with respect to the justice system. While restorative justice may be able to address the needs of victims, it is not equipped as a theory to acknowledge or promote the broader aims of ISCs and ‘cultural and political transformation of the law’ as sought by Indigenous peoples.³²⁶ Restorative justice

³¹⁷ Cunneen, ‘Sentencing, Punishment and Indigenous People in Australia’ (n 94) 13 (emphasis in original).

³¹⁸ Blagg and Anthony (n 28) 257–8.

³¹⁹ *Ibid* 258.

³²⁰ *Ibid* 245.

³²¹ *Ibid* 246, 258.

³²² Proulx (n 307) 81.

³²³ *Ibid* 104, quoting Drummond (n 315) 136.

³²⁴ Blagg and Anthony (n 28) 246.

³²⁵ *Ibid*.

³²⁶ Marchetti and Daly (n 3) 415.

framing deprioritises these aims, and favours settler-colonial evaluative measures such as rates of recidivism and deterrence. As a result, ISC outcomes are unfairly evaluated against narrow measures leading to the closure of ISC programs in some jurisdictions, and Indigeneity being viewed through a lens of risk.

While ISCs are by no means ideal examples of deliberative democracy, the theory provides an alternative evaluative framework by which we can examine the laws governing ISCs: namely, Dryzek's hallmarks of deliberative capacity (inclusivity, authenticity and consequentiality).³²⁷ These can be used to assess the legitimacy of the deliberation afforded to Elders and Respected Persons who play an integral role within ISCs.

When inclusivity is used as a criterion for evaluating ISCs, it becomes clear that there are some shortcomings with regards to both inclusive language and cultural practices. There is a clear and important need to facilitate Aboriginal and Torres Strait Islander languages in the court process in order to achieve inclusive deliberation. By working towards greater incorporation of Indigenous languages and laws within ISCs, both the deliberative hallmarks of inclusivity and consequentiality could be strengthened leading to a more legitimate deliberative forum. The laws governing ISCs constrain authentic deliberation by coercing Elders and Respected Persons through prescribing the content and application of such deliberation.³²⁸ These laws limit what can be deliberated and how those deliberations are given effect. They govern the role of judicial officers overseeing the ISCs.

Furthermore, by examining the extent to which ISCs enable consequential deliberation by Indigenous participants, it is possible to evaluate whether such Indigenous communities are empowered within this process. Constitutional issues limit the extent to which judicial power can be delegated to Elders or Respected Persons.³²⁹ Where Elders and Respected Persons are not provided with the power to shape outcomes, community confidence in the system may wane. It has been noted that the presence of Elders and Respected Persons has led to the defendant having a greater understanding of, and greater amenability towards, the overall sentencing process.³³⁰

Deliberative democracy may provide a pathway towards addressing power imbalances between Indigenous law and dominant non-Indigenous law, leading to a more nuanced discussion about how such imbalances may be addressed at a structural level. Strengthening deliberation using Dryzek's three hallmarks may shape law through the development of forms of hybrid justice and interlegality between Indigenous legal systems and dominant non-Indigenous systems.³³¹ By achieving hybridity through deliberative democracy the legal hegemony of the Global North may be challenged.³³² The ideas, philosophies and practices of Aboriginal peoples may be able to penetrate the dominant non-Indigenous legal system resulting in change to mainstream justice systems and a degree of

³²⁷ Dryzek, 'Democratization' (n 161) 1399.

³²⁸ Levy, 'The Coercion Problem' (n 171) 8.

³²⁹ Appleby et al (n 293) 141.

³³⁰ *County Koori Court Final Evaluation Report* (n 268) 30–32.

³³¹ Levy and Orr (n 122) 195.

³³² Blagg and Anthony (n 28) 246.

commensurability.³³³ The legitimisation of deliberation in ISCs may facilitate negotiation between legal systems in which hybrid forms of justice may emerge and where Indigenous disadvantage within the justice system may be addressed.³³⁴ If pursued, these ideals may see a coalescence of Indigenous and dominant non-Indigenous laws, where both legal systems are able to mutually inform and understand the values of the other.

³³³ Proulx (n 307) 81.

³³⁴ Blagg and Anthony (n 28) 246.