

THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA

Diverting Justice: The Justice James Muirhead Fellowship to explore alternative and culturally specific programs which aim to divert indigenous first time offenders from the criminal justice system

Report by Sandra Wendlandt, Churchill Fellow 2014

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Signed Sandra Wendlandt Dated

INDEX

INTRODUCTION.....	2
1. EXECUTIVE SUMMARY	4
2. PROGRAM	5
2.1. Table of Fellowship Program 29 Sept 14- 21 November 14	5
2.2. Post-trip	8
3. DIVERSION AND THE JUSTICE SYSTEM	9
3.1. Diversion and restorative justice: preliminary comments.....	9
3.1.1. The sentencing landscape	10
3.1.2. Diversion in the NT and current legislative framework.....	10
3.1.3. Diversion in Australia	12
3.1.4. A further comment on indigenous people and the justice system	13
3.1.5. A few words on restorative justice.....	14
3.2. Global application and practice	16
3.2.1. New Zealand.....	16
3.2.2. Canada.....	21
3.2.3. South Africa	29
3.2.4. Diversion in South Africa	29
3.3. An overview of Restorative Justice initiatives in Europe.....	33
3.3.1. Schleswig-Holstein, Germany.....	33
3.3.2. Leuven, Belgium	34
3.3.3. Utrecht and Amsterdam, The Netherlands	34
4. CONCLUSION.....	35
4.1. Summary of approaches.....	35
4.2. Recommendations for Diversion	37
4.3. Concluding thoughts: tears of justice	38
5. BIBLIOGRAPHY	40

INTRODUCTION

If you said to me that a large looming someone stole your bag and that it made you anxious to encounter other large looming people, I would sympathise. If you told me someone with a knife played near your children at the park and you were reluctant to let them go again alone, I might agree. If someone urinated in the stairwell of your office building or broke a window, I would expect it reasonable that this someone at least clean their mess and repair their damage. If I told you the large someone was a young homeless man who used your money to buy food, you might see his desperation. If you knew the knife was in fact a pocketknife and in a pocket, you might exhale a sigh of relief and wonder what the fuss was all about. And once the broken window was repaired and the floor cleaned you might wonder whether it is in fact necessary for that person to end up in court. What if these three people were in trouble with the law for the very first time: the effect of a criminal history potentially changing the course of their lives forever. The question that follows then is are these stories, now in placed context, good reason enough to enter the criminal justice system.

In the Northern Territory there is a considerable chance that people charged by police will be indigenous. Indigenous people are over-represented in the justice system in Australia, particularly in the Northern Territory. They are also overrepresented in New Zealand and Canada, and in South Africa the justice system struggles with the legacy of apartheid where certain cultural groups are also overrepresented. What these countries share with Australia is a profound and complex (post)colonial history of indigenous oppression and dispossession which cannot be wrested from the manner in which the justice system operates. What they share with the Northern Territory in particular, distinct from large parts of Australia, are the challenges of remote and sparsely populated communities, many of whom are indigenous; low rates of employment in these areas; lack of access to services; the alienating effect of mobile courts; and limited resources for justice programming. However, these countries have developed different ways of incorporating indigenous, culturally diverse approaches into the justice system in an effort to reduce the contact that indigenous people have with the justice system. These involve diversion and diversionary practice,¹ including restorative justice, peacemaking and other community-based interventions into crime, offenders and victims.

It is in this spirit that my Fellowship project was born: to examine creative ways that first time offenders can be dealt with in the Northern Territory given the absence of diversion and diversionary approaches and to identify what criminal defence lawyers who work in aboriginal aid, prosecutors, court services, as well as community groups can do to fill this gap and to reduce the contact indigenous people have with the justice system. As part of my Fellowship I visited parts of New Zealand, Canada and South Africa. While diversion approaches in New Zealand, Canada and South Africa have been longstanding, I discovered that many justice systems were going far beyond diversion to engage restorative justice practices for all manner of offences. In a sense, these alternative approaches

¹ Diversion programs meant for first time offenders (or people with minor offences) and diversionary to include rehabilitative programs, restorative justice programs and other life skills or engagement programs aimed at reducing recidivism and encouraging repair for the both offender and the victim (in some cases) regardless of seriousness of the offence.

challenged ideas of what it means to live in a politically and socially active community. The theoretical underpinning of restorative-reinvesting-therapeutic justice was also important to consider, and in this light I also found it prudent to visit northern Germany, Belgium, the Netherlands and had a brief encounter with the United Kingdom where considerable research (and practice) is underway in the field of restorative justice. Discovering the global reach of these approaches to diversion and restorative justice has elucidated tools that actors in the justice system, such as myself - a criminal defence lawyer working in aboriginal legal aid - might draw on and apply in the Northern Territory. The same applies for the prosecution, indigenous community groups, and other court services. Crucially, and critically, my non-indigenous self grappled with producing recommendations. An answer to the precise manner in which diversion and diversionary approaches should be developed must emerge from the community, and in this case it must lie in an indigenous voice, meant in the plural sense.

I am grateful to the family of the late Justice James Muirhead, particularly Mrs Margaret Muirhead for her generosity and sharp insight. I am hopeful the findings of my Fellowship will contribute to improving social justice for indigenous people in the Northern Territory, as is the philosophy underpinning the James Justice Muirhead Fellowship.

I extend my thanks to the board of the North Australian Aboriginal Justice Agency, CEO Priscilla Collins and to David Woodroffe for allowing me study leave to undertake this fellowship. Also thanks to Jared Sharp for his encouragement and enthusiasm, to George Georgiou of the Victorian Bar and to Jenny Renfree from NT Police.

Many stories were shared everywhere I travelled and I am glad to have met so many interesting people doing so many great things. Special thanks to Kim Workman for the coffee and ginger cake in your backyard, to Mike Hinton and Boris van Beusekom for the tears, and to Graham Edward Bradley and Judge Tony Spence for kick-starting my Vancouver visits, to Alex Wolf for my first smudge, and to Shelia Rabbitt for picking me up outside Humpty's and driving me out to the remarkable Tsuu T'ina Nation. To Deven Singhal for his friendship, and to Jonathon Rudin for connecting me to others. To all the researchers in the Netherlands and Belgium and to Heather Strang in the UK for food for thought, and to Bjorn Suess and Jo Tein in Germany for showing me how Kiel does justice. Particular thanks to Vanessa Padayachee for organising the perfect program for my visit to Cape Town; you made it seamless.

To my travelling companion and partner, Pierre Fregeau, thank you for your listening ears, your thoughtful philosophy and for taking such good care of me. To Susan Stearn: thanks for the adventure. As always, Sarah Rogers, your suggestions were endlessly helpful.

And lastly, Judge David Carruthers, you said that I should consider our conversation Chapter One. This is I suppose, just the beginning. There is so much more to do.

1. EXECUTIVE SUMMARY

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Exploring alternative and culturally specific programs which aim to divert indigenous first time offenders from the criminal justice system.

Diversion for adults is not available in the Northern Territory (NT) but strong arguments exist as to why it should. Indigenous people, adults and youth, remain overrepresented in the justice system in the NT. Sentencing options are disproportionately weighted in favour of mandatory regimes and few options exist in terms of restorative, therapeutic, community focused responses. Such options arguably supplement and strengthen the justice system and make it more relevant for people who pass through its doors. This is particularly so for people who have been charged for the first time with a minor offence. Many innovative ideas have emerged in the criminal justice sectors in New Zealand, Canada and South Africa, as well as parts of Europe, countries which aim at increasing restorative therapeutic practices in sentencing and bolster their well-established diversion programs for first time offenders. Restorative justice is invariably linked to diversion, and many countries such as Germany, Belgium, the UK and the Netherlands are at the forefront of research and practice in this field, including policy-makers and academics. New Zealand and Canada share with Australia (and the NT) a (post)colonial history that cannot be divested from the way in which the legal system operates. South Africa, emerging from the divisiveness of apartheid, the segregation of communities and the struggles of competing systems, also shares similarities in this regard. All countries face challenges of remoteness of some communities, limited resources, and over presentation of indigenous people in the justice system and I aim to demonstrate how diversion in NT could contribute meaningfully to reducing indigenous contact with the justice system.

Highlights

- The astonishing cross-section of judiciary, lawyers, social workers, academics and others who generously shared their time, knowledge and thoughts across the world, including those who continue to make contact since I have returned.
- Attending the “Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence + Conference” at the University of British Columbia in Vancouver, Canada, 9-10 October 2014, as well as taking part in my first smudge with the assistance of Alex Wolf.
- Visiting the Tsuu T’ina Nation and courts, southwest of Calgary, Canada
- The fantastic organisational skills (and philosophical insight) of Vanessa Padayachee from NICRO who facilitated access to courts, professionals and court support services, in Cape Town, Khayelitsha and Mitchells Plain, South Africa.

Lessons

- Several diversion programs have been developed that are not limited to first time offenders and are available for more serious offending, and many countries have gone further to develop specific community (and indigenous focused) courts.
- There is a complex relationship between restorative justice and the legal system, what each system facilitates and how 'success' is measured (for instance by rates of reoffending, by frequency of offending, by indicators from communities, by approvals from victims, by measures of anticipated costs).
- Diversion has also been used to clear busy court lists of trivial offences so that courts can spend more time and resources on more serious matters.
- Legislating diversion, as well as restorative justice panels, is a key approach to ensure their longevity.
- Engaging local community groups is essential as communities and their cultures vary widely
- Diversion in the NT is possible (and really can be for both indigenous and non-indigenous), and necessarily, it must require indigenous involvement as to its make-up and design.

Dissemination and Implementation

- Presentation to NAAJA as part of Continuing Professional Development, May 2015
- Conference paper presentation at Criminal Law Association of NT Bali Conference June 2015
- submission of journal article(s)
- Direct presentations in 2015 to Attorney General of NT, NT Police, Corrections, community organisations and other interest groups.

2. PROGRAM

2.1. Table of Fellowship Program 29 Sept 14- 21 November 14

Dates	Place	Individuals/organisations consulted
29 Sept – 3 Oct 2014	<u>New Zealand</u>	
	Wellington	<p>Jennifer Parker <i>Restorative Justice Facilitator, Wellington Community Law Centre</i></p> <p>Judge Sir David Carruthers <i>Chair, Independent Police conduct Authority District Court Judge, former Chairperson of New Zealand Parole Board (2005-2012)</i></p> <p>Janine Monahan and Simon Bull <i>Senior Policy, Police Prosecution Service</i></p> <p>Professor Chris Marshall <i>Restorative Justice Chair, Faculty of Law, Victoria University of Wellington</i></p> <p>Mike Hinton (General Manager) and Boris van Beusekom <i>Facilitators, Restorative Justice Aotearoa</i></p>
	Manakau	<p>Kim Workman <i>Founder and Strategic Adviser Rethinking Crime and Punishment</i></p>
	New Plymouth	<p>Pamela Jensen <i>Mediator, Solicitor and Barrister Taranaki Restorative Justice Trust, Jensen Law</i></p> <p>Dr Nigel Christie <i>Director, Taranaki Restorative Trust</i></p>
6 -10 Oct 2014	<u>Canada</u>	
	Vancouver	<p>Judge Tony Spence <i>Judge, Port Coquitlam Provincial Court</i></p> <p>Craig Giles <i>Crown Counsel, Port Coquitlam Provincial Court</i></p> <p>Judge David St Pierre <i>Judge, Vancouver District Provincial Court</i></p> <p>Alexander Wolf <i>Director, Indigenous Community Legal Clinic</i></p> <p>Camran Chaichian <i>Managing Lawyer, Legal Services Society British Columbia</i></p>

		<p>Attended: Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence + Conference University of British Columbia Law School</p>
13-17 Oct 2014	<p><u>Canada</u> Calgary Tsuu T'ina</p>	<p>Deven Singhal <i>Crown Counsel, Calgary Prosecution Service</i></p> <p>Mark Winterford <i>District Director Calgary Community Corrections (by telephone)</i></p> <p>Shelia Rabbitt <i>Coordinator, Tsuu T'ina Nation/Stoney Corrections Society</i></p> <p>Roxanne Crowchild <i>Peacemaker, Office of the Peacemaker</i></p>
20-25 Oct 2014	<p><u>Canada</u> Toronto</p>	<p>Scott Ryerson <i>Associate Professor, Department of Criminology, Ryerson University</i></p> <p>Miriam Henry <i>Crown Prosecutor Aboriginal Youth Court</i></p> <p>Taunya Paquette <i>Director</i> Adit Sommer-Waisglass <i>Lawyer</i> <i>Native Child and Family Services of Toronto</i></p> <p>Jonathon Rudin <i>Program Director</i> <i>Aboriginal Legal Services Toronto</i></p> <p>Heather Young and Bronson Bob <i>Youth Community Council Caseworkers</i> <i>Aboriginal Legal Services Toronto</i></p> <p>Judge Kofi Barnes <i>Superior Court of Justice Brampton</i></p>
28 -31 Oct	<p><u>Germany</u> Kiel</p>	<p>Joachim Tein <i>Head of Division, Soziale Dienste der Justiz, freie Straffälligenhilfe und Therapieunterbringung Ministerium fuer Justice, Kultur und Europa des Landes Schleswig-Holstein</i></p>

		<p>Bjorn Suess Mediator, Täter-Opfer Ausgleich</p> <p>Jessika Hochman <i>Ministerium für Justiz Kultur und Europa des Landes Schleswig-Holstein Referat Soziale Dienste der Justiz, Freie Straffälligenhilfe und Therapieunterbringung</i></p>
3- 14th Nov 2014	<p><u>Brussels</u></p> <p>Leuven</p> <p><u>The Netherlands</u> Utrecht</p> <p>United Kingdom (by telephone)</p> <p>Amsterdam</p>	<p>Professor Inge Vanfraechem <i>European Restorative Justice Forum/Leuven Institute of Criminology, University of Leuven (KU)</i></p> <p>Dr Annemieke Wolthuis <i>Senior Researcher, Verwey-Jonker Institute, Utrecht University</i></p> <p>Dr Renee Kool <i>Associate Professor/PhD Dean Faculty of Law, Economics and Governance, Willem Pompe Institute of Criminal Law and Criminology, Utrecht University</i></p> <p>Dr Heather Strang <i>Director, Police Executive Programme, and Director of Research, Jerry Lee Centre for Experimental Criminology Institute of Criminology University of Cambridge</i></p> <p>Attended: The Restorative Practitioner Training, <i>International Institute for Restorative Practices</i></p>

3. DIVERSION AND THE JUSTICE SYSTEM

3.1. Diversion and restorative justice: preliminary comments

Diversion for adults is not available in the Northern Territory (NT) but strong arguments exist as to why it should be. Indigenous people, adults and youth, remain overrepresented in the justice system in the NT. At the same time sentencing options are disproportionately weighted in favour of mandatory regimes and few options exist in terms of restorative, therapeutic, community-focused responses. Such options arguably can supplement and strengthen the justice system and make it more relevant for people who pass through its doors. This is particularly so for people who have been charged for the first time with a minor offence. Many innovative ideas and practice have emerged in the criminal justice sectors in New Zealand, Canada and South Africa, as well as parts of Europe, countries which aim to increase restorative therapeutic practices in sentencing and to bolster their well-established diversion programs for first time offenders.

These three countries over the past 30 years have introduced initiatives which are founded on restorative, therapeutic approaches to justice that are cost effective, aim to reduce recidivism and to restore the community. For instance, in New Zealand, diversion is not limited to first time offenders, and people can undergo diversion with police many times, nor is it limited to what might be classified as minor offences. It is also legislated. New Zealand also has a growing engagement with the Maori community in the justice sector: from iwi liaison officers, community justice panels in the community to holding court in Maori. Restorative justice conferences for cases involving an offender (who is pleading guilty) and an identifiable victim, are now also legislated. In Canada, the default position of prosecution is to consider legislated 'alternative measures' for a wide range of offences, and in some cases, is not limited to first time offenders. Courts that are designed specifically for indigenous people are also longstanding in Canada, and include peacemaking circles and unique courts and court referral systems where participation in such courts ultimately (often) results in the withdrawal of charges altogether. In South Africa, a young democracy with a strong civil society involvement in justice and conflict, diversion for youth and adults has been operating, initially informally, through the social sector for decades. South Africa's approach to the development of diversion is novel and has emerged through community practice rather than political or legal avenues.

Restorative justice is invariably linked to diversion, and many countries such as Germany, Belgium, the UK and the Netherlands are at the forefront of research and practice in this field, including policy-makers and academics. Restorative justice, an approach that has both a wide support base and many critics, is understood here to supplement, enhance and support the existing justice system, meant in the sense that it may not necessarily be 'the answer' to the 'failings' of the justice system, but that it has sound potential to assist.² Success of such approaches is understood in different ways: measured by rates of reoffending, by frequency of offending, by indicators from community, by approvals from victims, by measures of anticipated costs.

² Kelly Richards, 'A promise and a possibility: the limitations of the traditional criminal justice system as an explanation for the emergence of restorative justice' (2014) 2(2) *Restorative Justice: An International Journal* 124

Indigenous people must be involved in the design and running of diversion programs for them to be successful. There are steps defence lawyers, community corrections and prosecution can take within existing legal frameworks to instigate diversionary type practices for appropriate low level cases, although any restorative justice style conferencing would best be run by groups other than the police. Legislative change is needed to ensure sustainability.

3.1.1. The sentencing landscape

Limited sentencing options exist for people who plead guilty, or are found guilty, by criminal courts in the NT. The sentencing landscape disproportionately emphasises mandatory sentencing and very little exists in the way of community-based dispositions, therapeutic or restorative justice approaches to sentencing. This applies across the spectrum of criminal offences. Criminal justice processes are also politically located, and in countries such as Australia, New Zealand, Canada and South Africa they posit themselves, where it concerns indigenous people, in a (post)colonial discourse of indigenous oppression and dispossession. Imposed systems of justice struggle with the challenges of making justice relevant for/with/by indigenous people: the unresolved legacy of which is reflected clearly in the overrepresentation of indigenous people in many systems of justice in Australia and many other countries.

Sentencing a person who pleads guilty or is found guilty in a criminal court requires an evaluation of a number of different factors: deterrence and denunciation, rehabilitation and community protection, the collective effect of which aims to maintain community values. The weight attributed to each of these factors will be different depending on the circumstances of the case, which includes the circumstances of the offender.³ Mandatory (custodial) sentencing for violence and criminal damage offences, as exists in the Northern Territory,⁴ limits the ability of the judiciary to be creative in tailoring sentencing, rendering the actors in the justice system – prosecutors, defence lawyers and judiciary – somewhat passive. Very few ‘offenders’ qualify for community-based dispositions. While diversion programs for people who encounter the justice system for the first time for minor offences has been in place for juveniles since 2000, no such programs exist in the adult jurisdiction. Diversion and diversionary programs are a critical, accessible and lacking aspect of the sentencing landscape in the Northern Territory.⁵

3.1.2. Diversion in the NT and current legislative framework

While diversion as a standalone disposition does not exist in the Northern Territory, the existing sentencing framework in the adult jurisdiction for minor offences does allow for dismissals, discharges and bonds. Section 9 of *Sentencing Act* NT covers the purpose for which such dispositions are given. It allows for:

- (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in

³ as listed under sentencing guidelines, s 5, 6 and 6A *Sentencing Act* NT

⁴ Reintroduced June 2013

⁵ Diversion programs for first offenders could also naturally apply for all people who come before the courts, not just indigenous people.

- the community; or
- (b) to take account of the trivial, technical or minor nature of the offence committed; or
- (c) to allow for circumstances in which it is inappropriate to record a conviction; or
- (d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment; or
- (e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender.

These dispositions are still recorded on a person's criminal history, as are without conviction dispositions. Section 8 considers the circumstances in which a conviction should be recorded, at (1):

- (a) the character, antecedents, age, health or mental condition of the offender; and
- (b) the extent, if any, to which the offence is of a trivial nature; and
- (c) the extent, if any, to which the offence was committed under extenuating circumstances.

Section 100 of the Act also allows for undertakings to complete treatment programs by consent. No statistical data appears to be available in relation to the number of dismissals or discharges that are handed down. Indeed, in practice, such dispositions are most uncommonly handed down.

In the past the NT did introduce initiatives to divert drug users away from the courts and criminal justice system as part of the National Illicit Drug Strategy⁶, but its programming is unclear. There appears to have been some efforts in place in and around 2008, which included the Court Referral and Evaluation for Drug Intervention and Treatment in Alice Springs and Darwin.⁷ In practice it ordinarily manifests in an infringement notice.⁸ It was unavailable for people with significant mental health issues.⁹ At present, it is not legislated or part of the programming available at court and its existence is unclear. As a practitioner, I have not encountered this as a pathway for clients at court. Sometimes police proceed by way of issuing infringement notices for small quantities of drugs for personal use, but these notices are subjected to time limits and it is not uncommon for people to be charged and to present at court for possession charges for small quantities, such as one gram of cannabis.

In the youth jurisdiction, a standalone *Youth Justice Act* NT for children between the ages of 10-17 contains an entire division dedicated to diversion under part 3. Police have the power to divert youth in place of charging them, and can make a range of divertable decisions, including issuing a warning (written and verbal), convening a Youth Justice Conference (where members of the youth's family must attend and a victim (or victim's representative) or referring them to a more substantial diversion program as laid out in section 39(2).¹⁰ This diversion program is administered in the most part by organisations such as the NT arm of the YMCA. In place since 2000, the youth diversion program is considered to have had a

⁶ See further information on this government diverted policy: <http://www.nationaldrugstrategy.gov.au>, accessed at 17 January 2015

⁷ Caitlin Hughes and Alison Ritter, 'A Summary of Diversion programs for drug and drug-related offenders in Australia' (2008) *Drug Policy Modelling Program Monograph Series 16*, National Drug and Alcohol Research Centre, 18

⁸ Jennifer Ogilvie and Katie Willis, 'Police drug diversion in Australia' (Series 3 March 2009) *Australian Institute of Criminology Criminal Justice Bulletin 1*, 3

⁹ Hughes and Ritter, above n 7, 19-20

¹⁰ While this suggests that youth can be dealt with on a number of occasions under this section, it is limited s 39 (3) Subsection (2) does not apply if: (a) the youth has left the Territory or the youth's whereabouts is unknown; or (b) the alleged offence is a [serious offence](#); or (c) the youth has, on 2 previous occasions, been dealt with by [Youth Justice Conference](#) or diversion program (or on one of the occasions by [Youth Justice Conference](#) and on the other by diversion program); or (d) the youth has some other history that makes diversion an unsuitable option (including a history of previous diversion or previous convictions).

position impact on rates of reoffending, as observed by the Australian Institute of Criminology. Its report in 2007 suggested in relation to reduction or slowed rates of reoffending in the study: “the implication of this is that making these juveniles go through the court process exposes them to an unnecessary and possibly damaging experience for them, and is an unnecessary use of time and resources for the criminal justice system [...] the finding of apparent desistance suggested that it was neither necessary nor desirable to respond harshly or intrusively to young offenders who have not committed serious offences or shown any tendency to persist in crime.”¹¹

More recently, the Youth Justice Review conducted in 2011 highlighted the need for further expanded diversionary programs in light of increasing rates of youth crime. The Review said that evidence suggests that diverting young people away from courts reduced re-offending rates, that it was more cost effective to run diversion programs. On that basis, it recommended the expansion of diversionary options, which forms recommendation 5 in their report, as well as the expansion of the eligibility requirements for diversion.¹² It also suggested alternative future developments such as allowing young offenders who commit a range of first time driving offences to be eligible for diversion. Youth crime is linked to social and family dysfunction, limited education, mental health, drug and alcohol issues, among others. These factors are also present in trends in adult crime, and while the emphasis on youth is (and should be) rehabilitation and education, there is logic in applying similar approaches to diversion to the adult jurisdiction.

3.1.3. Diversion in Australia

Many jurisdictions in Australia run adult diversion programs.¹³ They are canvassed in brief here:

- Victoria has a legislated diversion program in its *Criminal Procedure Act 2009* (Vic) under s 59 which is a pre-court program for first time offenders requiring a recommendation by police and is usually approved by a judicial officer in chambers and only rarely requires a court appearance. The offence must be triable summarily and not subject to mandatory sentencing.
- New South Wales has a legislated conditional discharge on a good behaviour bond, commonly known as a ‘section 10 bond’ in its *Crimes (Sentencing Procedure) Act 1999* (NSW) which does require a court appearance and has the effect of not recording a criminal record.
- South Australia has a diversion program for people with a mental illness or impairment under section 19C of the *Criminal Law (Sentencing Act) 1988* (SA), which is operated by the Magistrates Court of South Australia, as well as a discharge without sentence on entering into a bond under section 39 of the same Act, which requires a court appearance but has the effect of not recording a criminal record.
- Western Australia has a specific drug diversion program, a pre-sentence opportunity program, an indigenous diversion program that operates in remote areas, and has a

¹¹ see Teresa Cunningham, ‘Pre-court diversion in the Northern Territory: impact on juvenile offending’ (June 2007) *Trends and issues in crime and criminal justice* No 339 at 5-6

¹² Northern Territory Government, *Review of the Northern Territory Youth Justice System* (September 2011), see part 3 in particular: at 167

¹³ For a comprehensive overview of the development of diversion see Hughes and Ritter, above n 7, 18. Despite the age of this report it remains highly relevant and was written at a time where diversion programs in Australia were expanding considerably.

focus on drug and alcohol related issues. It is operated by a diversion officer at the Magistrates Court and requires a court appearance. The *Sentencing Act 1995* under s 46 allows for release without sentence.

- Tasmania operates a Court Mandated Diversion program for youth and adults with drug and alcohol issues, the treatment component of which is outsourced to not-for-profit agencies. It can be attached to bail programs, is magistrate referred, and is often applied post-plea, which means it requires a court appearance. Of significance is that it can be available for family violence offences.¹⁴ It does require a finding of guilt, which differs from other jurisdictions. Section 7 of the *Sentencing Act 1997* (Tas), in particular s 7(f) allows for an undertaking and release and at (h) a dismissal of the charge without conviction.
- The Australian Capital Territory (ACT) runs a Police Early Intervention and Diversion Program for people with drug and alcohol offences. It involves referral and assessment for people by police as a pre-court process separate from the criminal justice system.¹⁵ The legislative framework in the ACT does not offer diversion.

All jurisdictions operate or are linked into other therapeutic programs as part of sentencing, such as therapeutic, community based dispositions, drug or mental health specific courts and community (including indigenous) courts. The NT previously ran a SMART drug and alcohol court - decommissioned in 2013 after only being in operation for 18 months¹⁶ as well as indigenous community courts for the period 2004-2012,¹⁷ and does have limited programming for suspended terms of imprisonment and community work.

3.1.4. A further comment on indigenous people and the justice system

Culturally nuanced sentencing, of which diversion is a part, is important, and there are some observations to make about the relationship of the justice system in Australia with its indigenous people. This is particularly relevant to the NT where a significant number of people before the justice system are indigenous. The criminal justice system, as it relates to indigenous people, is an imposed system with colonial roots. For a considerable period since white settlement, indigenous people were not considered equal in the application of, and participation in, the criminal justice system. Arguably the criminal justice system in the NT continues to operate as an imposed system with little cultural relevance (as distinct from being run by indigenous people), and issues such as lack of knowledge and understanding of the 'western' system, limited resources and language constraints, all impede equal access to justice.¹⁸

¹⁴ Success Works, *Tasmania's Court Mandated Drug Diversion Program: Evaluation Report* (November 2008), 12

¹⁵ see <http://www.police.act.gov.au/community/programs/early-intervention-and-diversion-program.aspx>, accessed at 23 January 2015

¹⁶ Clare Rawlinson, 'SMART' courts' elimination worries Chief Magistrate as mandatory rehab begins' (1 July 2013) ABC News Darwin, <http://www.abc.net.au/local/stories/2013/07/01/3793167.htm>, accessed at 25 January 2015

¹⁷ Closed to due funding constraints and questions about the courts' legal status. See Hillary Hannam, 'Current issues in Delivering Indigenous Justice: Challenges for the Courts' (Paper presented at Australian Institute of Judicial Administration Conference at University of South Australia, Adelaide, 18 July 2013)

<http://www.aija.org.au/Ind%20Courts%20Conf%2013/Papers/Hannam.pdf>, accessed 7 February 2015, page 4

¹⁸ I thank Heather Strang, University of Cambridge, for discussion on this point

Critical post-colonial theory would suggest that, *inter alia*, colonisation and postcolonial processes are not simply historical events, rather that “they are continuing social, political and cultural processes” and that a reflexive and engaging integration of this reality in the criminal justice sector is yet to be substantially realised.¹⁹ What this creates is a picture of criminal offending (by indigenous people) that “is not only understood as an outcome of disadvantage and marginalisation: it is also linked to non-economic deprivation such as damage to identity and culture, as well as trauma and grief.”²⁰ A pertinent example of this continuing process is the fraught history of indigenous political participation in Australia. This is relevant to community support of policies relating to criminal justice issues and sentencing, through voting in government elections. Voting by indigenous people in Australia has been historically poor, universal in Australia only since 1965. Many indigenous people today are not enrolled to vote despite some governmental efforts to encourage enrolment.²¹ This has the obvious effect of limited participation in the political process by indigenous people, with the flow on effect of a distorted community support of various policies, including criminal justice policy.

To its credit, a recent amendment to the *Sentencing Act* (NT) now allows for a party to the proceeding to present information to the court regarding customary law or cultural practices.²² But there is plenty of room to develop programs unique to indigenous people in sentencing, programs in the vein of Cunneen and Rowe who suggest that “healing is quintessentially and simultaneously an individual and collective experience. It is far more expansive than the notion of rehabilitation: it is concerned with healing self and community. [...] mainstream programs simply ignore the nexus between oppression and liberation, between collective grief and loss and individual healing.”²³

3.1.5. A few words on restorative justice

The theoretical underpinnings of diversion derive in part from restorative justice principles, which have received growing support and presence in many countries. Restorative justice, provides an (ideally) voluntary avenue of dialogue between a person who has wronged and a victim, where there is one. The United Nations defines it to “manage the harm done and to restore the offender and the victim to their original status as far as possible” and that it presents as a supplement to criminal justice options of trial and punishment.²⁴ It seeks as much to ensure healing of the offender as of the victim.²⁵ It shares sentiment with therapeutic jurisprudence that acknowledges that the law is a social force with psychological consequences for all involved. Therapeutic jurisprudence, as a platform where restorative

¹⁹ Chris Cunneen and Simone Rowe, ‘Changing Narratives: Colonised Peoples, Criminology and Social Work’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 49, 50

²⁰ ATSI Justice Commissioner *ibid*, 59

²¹ See historical overview: <http://www.aec.gov.au/indigenous/milestones.htm>. The Australian Electoral Commission established the Indigenous Electoral Participation Program (IEPP) in 2010 to close the gap in Indigenous disadvantage in electoral participation: <http://www.aec.gov.au/Indigenous/files/iepp-factsheet.pdf>, accessed 14 January 2015

²² see s 104A *Justice and Other Legislation Amendment Bill 2014*

²³ Cunneen and Rowe, above n 1960

²⁴ Initially described in terms of being additional to or an alternative to criminal justice systems, the report concludes that it should be supplementary. United Nations Economic and Social Council Commission on Crime Prevention and Criminal Justice ‘Reform of the criminal justice system: achieving effectiveness and equity,’ Eleventh Session (Vienna 16-25 April 2002) (E/CN.15/2002/5), 2 and 9

²⁵ Restorative justice has been extensively written about since the 1970s. Well known criminologists linked to its development include American Howard Zehr, and in Australia John Braithwaite has written extensively on the topic, along with Heather Strang, now in the United Kingdom.

justice takes place, also considers law or justice bodies as an agent for healing.²⁶ Restorative justice practice can manifest as conferencing whereby the accused, victim and members of the community can come together under the guidance of a facilitator to work through issues. Diversion practices are linked to restorative justice, although not all diversion approaches need to be restorative in nature, for instance where there is no identifiable victim involved.²⁷ Some tension exists between process-oriented and outcome-oriented conceptions of restorative justice,²⁸ and clearly where justice systems require discrete tangible outputs, an 'assessment,' a 'program,' a box to tick, such requirements may appear somewhat antithetical to the restorative process. Not all restorative justice approaches need to be connected to the legal system, and there are numerous examples of restorative justice being applied in education, military, corporate or business sector, or between individuals wanting to work through grievances completely independent of the law.²⁹

Australia contributes to restorative justice research, particularly in the southern states of Victoria, Australian Capital Territory and New South Wales, but there is no national approach to the development of standards or practical application in the justice sector.³⁰ While the Youth Justice Review has recommended a 'justice reinvestment' approach to youth justice issues,³¹ the voice of restorative justice in the criminal justice sector is scarcely heard in the NT, some 4,000 kilometres north. The NT exists in stark contrast to its southern neighbours, a place of considerable differences, not only in physical landscape and climate, but also in demographic composition, and most notably in high numbers of indigenous people in the justice sector, such that any singular national restorative justice approach would invariably fail.

²⁶ David Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17, 20

²⁷ Ann Skelton and Mike Batley, 'Chapter 7: Whose Business? The respective roles of state and civil society in restorative justice' in *Changing progress, mapping the future: restorative justice in South Africa* (South African Law Reform Commission, 2005), 127

²⁸ interview with Heather Strang on 6 November 2014. Also Zoe Cosemans and Stephen Paramentier, 'Changing lenses to restorative justice: new directions for Europe and beyond' (2014) 2(2) *Restorative Justice: An International Journal* 232, 234. See also John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 21 *Crime and Justice* 1

²⁹ I am grateful to Mike Hinton and Boris Boris van Beusekom from Restorative Justice Aotearoa as well as Judge David Carruthers in Wellington, New Zealand, mediators at the Taeter-Opfer Verein Kiel, Germany and Heather Strang in the UK for discussion on this point

³⁰ organisations such as Smart Justice Australia, Just Reinvest NSW support these principles. See also Jacqueline Joudo Larsen, 'Restorative justice in the Australian criminal justice system' (2014) *Australian Institute of Criminology Reports Research and Public Policy Series* 127. For an evaluation of restorative justice approaches in Australia see Heather Strang, Lawrence W Sherman, Evan Mayo-Wilson, Daniel Woods, Barak Ariel 'Restorative Justice conferencing (RJC) Using Face-To-Face Meetings of Offenders and Victims: Effects on Recidivism and Victim Satisfaction. A Systemic Review.' (November 2013) *Campbell Systemic Reviews* 1

³¹ it recommends diverting funds that would otherwise have been used for imprisonment, to crime prevention, reduction and rehabilitation programs and services in local communities with high concentrations of offenders Northern Territory Government, *Review of the Northern Territory Youth Justice System* (September 2011) 162, 162

3.2. Global application and practice

The following section is divided into country-specific sections that I had the privilege of visiting: New Zealand, Canada and South Africa. The European countries I visited, Germany, and Belgium, and the Netherlands will primarily come under the following section 3.3 which considers the relationship between diversion and restorative justice, and other things we can learn from restorative justice practices. It is also worth noting that while this fellowship began with a focus on diversion for first time indigenous offenders (with the effect of no criminal record). As I travelled, its mandate expanded as it became clear that other innovative practices have emerged relevant to (and in some cases subsequent to) the introduction of diversion in these countries. Diversionary practices are in some cases more effective for more serious matters, and in those cases the emphasis on first time offending, criminal records etc were rendered unnecessary. It was also clear during the course of my interviews and visits that some form of dichotomous relationship exists between diversion and restorative justice practices, real or imagined, and care has been taken to distinguish between them where possible (and appropriate).

3.2.1. New Zealand

Before considering diversion programs in New Zealand, the briefest of introductions is necessary. New Zealand is a country with a large indigenous Māori population. At settlement in 1840, Māori people signed a treaty with British settlers called the Treaty of Waitangi that asserted their sovereignty, although its place in New Zealand history and politics has been turbulent. Both English and Māori are the official languages of New Zealand, which has the effect of having the right to have court conducted in Maori. All of this stands in stark contrast to Australia and its history with indigenous people and must be remembered when evaluating approaches to diversion and restorative justice.³²

Diversionary practices in New Zealand have been around for some 20-30 years, for both youth and adults. They include a comprehensive pre-court diversion, police diversion program, as well as significant application of restorative justice practices throughout the justice system. Diversionary practices reflect an interesting cooperation between police, the community sector, whānau ora organisations and government.³³ Considerable investment into the development of an integrated service delivery of health, education and social services underpinned by a whānau philosophy has occurred in New Zealand. Referred to as Whānau Ora it is a national indigenous health initiative and is jointly implemented by the Ministry of Health, Te Puni Kōkiri (Ministry of Māori Development, and the Ministry of Social

³² Rt Hon. Sir Geoffrey Palmer QC, 'Maori, the Treaty and the Constitution' (June 2013) *Maori Law Review* 1.

³³ Whānau generally refers to Māori people who share a common descent and kinship, are often built around families of multiple generations, and refers to the links between members, which do not rely on specific tasks but on ongoing relationships. It is also a philosophy for working collaboratively. The concept of *iwi* is essentially the level above whānau, not dissimilar to a tribe or clan. The strength of whānau is affected by socio-economic determinants, globalisation and the movement of people, and other risk factors, such as rates of contact with the justice system, weakened community health and disenfranchisement.

Development.³⁴ The justice system is part of this initiative also, for instance people can attend their whānau ora to obtain a driver's licence.³⁵

3.2.1.1. History of diversion

In 1984 there was a ministerial inquiry into the number of children in state institutions in New Zealand. It produced an impetus to look at alternative ways of addressing children, particularly māori children, who come into contact with the justice system.³⁶ This happened against the backdrop of 'tough on crime' rhetoric in New Zealand, but it became clear that simply being intolerant of poverty, welfare dependency and disadvantage did not assist anyone, and that a significant cultural shift was underway.³⁷ I met Kim Workman, a consultant in restorative justice issues of māori descent, and who has a long history of working in police, office of the ombudsman, department of māori affairs and prison services (and is a former Churchill Fellow).³⁸ He was kind enough to meet me at his home just over an hour north of Wellington. While working as a police officer Mr Workman was working in youth aid in the 1980s and was part of a team developed within New Zealand police to resist this institutionalisation. At the core of their programming was to emphasise self-determination, and to engage communities in developing solutions for their community, which included group conferencing. It was at this time that legislative amendments to the *Children, Young Persons and Their Families Act (1989)* (NZ) were made and that youth diversion was introduced, working from the principle that the longer you delay the entrance of young māori people into the court (and other government institutions), the less likely they are to return, or to ever come before the courts in the first place.³⁹

Quite radical for its time, such youth diversionary programs in New Zealand led to the introduction of adult diversion in 1990. The criticisms of such programs though were that significant numbers of māori people persisted in the justice system. Police investigations into māori participation in diversion revealed that some police had constructed certain ideas about what māori attitudes were, and made recommendations for diversion on behavioural indicators. Where a māori person may not have displayed 'remorse' in the same way that a person of Anglo-Saxon decent might have displayed it, police were in some cases less likely to recommend diversion. This has been described as essentially "failing the white person test"⁴⁰ and demonstrates how police discretion can be dangerous and difficult to monitor. Today, reporting of diversion and pre-charge warnings is computer recorded and has links to the police officer who approved or refused the program.⁴¹ Other examples of challenges for implementing diversion included police requiring a young person to make a donation to a charity of the police's choice. In one example, the police requested a young person to

³⁴ See Best Practice Journal, 'Whānau Ora: The theory and the Practice', (2011, Issue 37) *Best Practice Journal* http://www.bpac.org.nz/BPJ/2011/august/docs/bpj_37_whanau_ora_pages_10-17.pdf, accessed at 25 January 2015. See also Ministry of Health New Zealand website : <http://www.health.govt.nz/our-work/populations/maori-health/whanau-ora-programme>, accessed at 26 January 2015

³⁵ interview with Janine Monahan and Simone Bull, 30 September 2014

³⁶ see The Maori Perspective Advisory Committee, *Puao-te-ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988) Wellington, New Zealand.

³⁷ Interview with Professor Chris Marshall on 30 September 2014

³⁸ for a more detailed bio see <http://www.rethinking.org.nz/Default.aspx?page=3613>

³⁹ interview with Kim Workman, 1 October 2014

⁴⁰ I am grateful also to Mike Hinton on this point, interview 1 October 2014

⁴¹ interview with Janine Monahan and Simone Bull, 30 September 2014

donate to the SIDS foundation, which fit the needs and experience of the police officer, rather than the offender's or the victim's community. When asked later, the young person admitted he had no idea what SIDS was.⁴² In other examples, police had not notified families of māori people in the court system, or victims had failed to attend group conferencing, and there some suggestions that police may have been somewhat self-serving.⁴³ Political commitments to lower crime were also affected by suggestions that some rates of reoffending were distorted because rather than reducing crime, police would stop reporting it. This coincided with women's' refuges being just as full, even though reports of domestic violence at the time were that it was declining.

3.2.1.2. Police diversion

Police diversion for adults in New Zealand is multi-tiered. I was fortunate to meet senior policy advisors from the New Zealand prosecution service, Janine Monahan and Simone Bull who gave me a detailed overview of the way in which diversion works in New Zealand.⁴⁴ It is a widely published program and the police have intentionally gone to great lengths to communicate their diversion policy. There are a number of stages, which include pre-charge warnings that can be given for charges that carry no more than a penalty of 6 months imprisonment. This includes non-intimate violence offences. Interestingly, prosecution, as well as members of the legal community agree that diversion works more effectively for more serious offences.⁴⁵ The actual 'Diversion program' itself is post-charge, meaning a person must appear in court first before being diverted, with the result that no record against their name be recorded if they successfully complete the program. It can be given for just about any charge, although of course more serious matters would require significant consultation before any such course of action could be taken. Lawyers are not present during pre-court warnings, but are during diversion. The diversion program can be undertaken with a group conference or without, depending on the nature of the charge and whether there is an identifiable victim. Importantly, police can only offer diversion; judges are not able to order diversion, as found in *Susans vs New Plymouth District Court*.⁴⁶ This of course, generates problems with police or prosecution being judge, jury and sentence at the same time, an issue that was not lost on Ms Monahan and Bull.⁴⁷

The focus on rehabilitation in diversion programs has increased, and has been characterised by a greater degree of compliance as a result. Police have largely stopped ordering the payment of donations as they were considered ineffective financial penalties that mostly benefited Anglo-Saxon community groups. There is an increase in addressing family violence through diversion where budgeting, anger management and relationship/parenting counselling comprise a significant part. Instead of paying court costs, people undergoing diversion contribute this amount, commonly around \$180, to diversion related services they undertake. Police are also trying to tap into other service providers and draw on the expertise of iwi liaison officers who often have social work expertise. Where the person is

⁴² anecdote from interview with Kim Workman on 1 October 2014

⁴³ Interview with Prof Chris Marshall on 30 September 2014

⁴⁴ interview on 30 September 2014

⁴⁵ interview with Janine Monahan and Simone Bull on 30 September 2014; interview with Jennifer Parker on 29 September 2014, interview with Judge Sir David Carruthers on 29 September 2014

⁴⁶ At New Plymouth HC NWP CIV-2011-443-310 [26 August 2011].

⁴⁷ Interview with Prof Chris Marshall on 30 September 2014

māori the person's Whānau Ora is engaged in developing the pre-charge warning and diversion plan. Such multi-service approaches have been operating as a pilot for the last five years and have been implemented nationally for the last two years. It is an approach that is also not limited to māori people, but targets all cultural groups particularly where anti-social behaviour and gangs have formed.⁴⁸ People charged with more serious offences are commonly referred to (and now by law, must be referred to) restorative justice conferencing, and this is thought to be a very different dynamic to the Whānau Ora organised group conferencing.

Another example of working with community groups is the relationship developing between police and māori wardens. In history, and legislated since the 1950s or so, Māori people had their own systems of policing known as māori wardens. They focused in more recent decades on policing their own people who were drinking alcohol to excess. A recent injection of funding into this system has seen over 900 māori warden positions funded (they previously were only paid on a voucher system but now receive a salary). These wardens also assist with children being left in cars, removing intoxicated people from pubs, along with facilitating community relations. They are also included in intelligence briefing and wardens often go to events first to speak to people. Police believe that the community is receptive of these wardens who are essentially leaders, self-generated by the community; they participate in public meetings, fairs and community events, often dressed in uniform. As a result, the 'policing' emphasis is diluted and so they are visible and are trusted. Increasingly, these wardens are a mix of men and women, and the younger generation is being included also.

The philosophies of restorative justice, 'alternative resolutions' and the principle of helping people avoid the justice system, unless they absolutely cannot, is at the centre of NZ police diversion policy, as is police accountability to victims. The effect of convictions on young people is at the forefront of their work. Police also believe that diversion is effective for adults 40-50 years of age, including those with a criminal history. There appears to be a pattern between offending and maturity, and New Zealand police has taken that into account in deciding when to allow the opportunity for diversion.

After I left New Zealand I was contacted by email by Duncan Allen from the Wellington Legal Service to discuss a new pilot project in the Hutt Valley that he was a part of called the iwi justice panel, a form of community panel with community members and the offender (and no police). The pilot project sits somewhere between pre-charge warnings and diversion. Unique in its approach, it matters less what the charge is and more what the background of the person is. Even a person with a criminal history can take part in this process. Police involvement is limited and iwi liaison officers are the bridging contact person. The anticipated success of this project is because it will be run by iwi and the process will take place within a māori framework. Mr Allen was careful to point out that there must be a distinction between sanctions given under an iwi justice panel diversion model and sanctions handed down by courts: there can be a tendency for the punishment to be greater or too *similar* to court penalties.⁴⁹

⁴⁸ interview with Janine Monahan and Simone Bull on 30 September 2014

⁴⁹ very thankful that you contacted me Duncan. Interview with Duncan Allen on 5 December 2014

3.2.1.3. Restorative justice: it is sweeping this country

Some significant developments have occurred in restorative justice practice in New Zealand that are worth mentioning, both in diversion programs and other sentencing dispositions. The emergence of restorative justice practice in New Zealand has community roots, rather than policy or law.⁵⁰ Many community providers (22 of them at the moment) are collectively organised under an umbrella organisation called Restorative Justice Aotearoa (RJA) and are mostly funded by the Ministry of Justice and charitable trusts. Judge Sir David Carruthers, whom I was fortunate enough to meet, was involved in bringing this group together. His view was that the strength of restorative justice conferences is in the community voice: restorative justice practices also feature at the top end of sentencing in presentence stages as well as in parole assessments.⁵¹ This community-centred focus was also emphasised by the co-manager of the Wellington Community Legal Centre, Jennifer Parker, who is also a restorative justice facilitator.⁵²

Facilitators are required to undergo a training program, which is commonly taken up by community development workers, social workers and in some instances lawyers such as Pamela Jensen in New Plymouth.⁵³ Mike Hinton, who I was also able to meet on my travels, currently runs RJA. In response to my questions about the role of restorative justice in New Zealand, he introduced me to a documentary on restorative justice made in 2013 called 'Restoring Hope: An Indigenous Response to Justice.'⁵⁴ Significantly, recent amendments to the *Sentencing Act 2002* (NZ) have come into force since December 2014, which allows for adjournments to undertake restorative justice processes in certain cases.⁵⁵

A number of government ministries outside of the justice sector are investing in restorative justice approaches, including in education, schools, social services, and the business sector.⁵⁶ A restorative justice chair, the Diana Unwin chair in Restorative Justice at Victoria University, Wellington, which is currently headed by Professor Chris Marshall, aims to ground academic discourse in restorative justice.⁵⁷ It is funded by the Ministries of Justice, Education, Corrections, Business and Defence among others, and is designed to facilitate a collaborative engagement between public sector, civil society and academia. I sought to ascertain how 'cost effectiveness' was measured in restorative justice and diversion programs, and was met with the resounding response that it is nowhere near as costly to run as prison, particularly if the effect is that a person does not return to court, or that their rate of recidivism sharply declines. In the words of Ms Parker, the debate about cost is really over in New Zealand. We know it works.⁵⁸

⁵⁰ interview with Judge Sir David Carruthers, 29 September 2014

⁵¹ interview with Judge Sir David Carruthers, 29 September 2014. Judge Sir David Carruthers is a district court judge who was, among other things, the chairman of the parole board between 2005-2012.

⁵² Interview on 29 September 2014

⁵³ interview with Pamela Jensen on 2 October 2014.

⁵⁴ Hyperlink to documentary: <http://www.maoritelevision.com/tv/shows/pakipumeka-aotearoa/S04E001/restoring-hope-indigenous-response-justice>, accessed at 14 January 2015. Special thanks to Mike Hinton and Boris van Beusekom for sharing this documentary.

⁵⁵ Big thank you to Jennifer Parker from the Wellington Community Legal Centre for discussion on this point. See section 24A *Sentencing Amendment Act 2014*

⁵⁶ I am grateful to Judge Sir David Carruthers as well as Dr Nigel Christie from Taranaki Restorative Justice Trust on this point.

⁵⁷ Interview with Chris Marshall on 30 September 2014. At time of writing he was only a few months into the role. See the following link : <http://www.victoria.ac.nz/sog/researchcentres/chair-in-restorative-justice>

⁵⁸ interview with Jennifer Parker 29 September 2014.

3.2.2. Canada

Indigenous people in Canada, known as First Nations people, are widely varied. There are over 600 different First Nations bands or governments. Peace treaties between First Nations bands and British settlers were signed with the advent of white settlement in 1700s. Many treaties also governed land use rights of First Nations bands, something that contrasts considerably with the way in which British Australia engaged with indigenous people in Australia. But Canada also shares Australia's brutal history of forced removal of children from indigenous families into state care. In the mid to late 1800s-1996 residential schools funded by the Canadian government and run by church groups housed First Nations children in an effort to encourage assimilation into the dominant Canadian culture. The effect of this experience has been considerable trauma (both emotional and physical: many children were subject to compulsory sterilisation), dislocation and the devastating loss of culture and identity.⁵⁹ A Truth and Reconciliation Commission was held in 2013 and numerous Royal Commissions into First Nations have been held. Steps towards repair and healing are underway, but the full extent of trauma is yet to be realised.

3.2.2.1. History of diversion – a (somewhat) national approach

Diversion was introduced in Canada some 25 years ago as a way in which to reduce pressure on court resources: to eliminate the petty, bottom-end offences so that the court could dedicate more of its time to more serious matters.⁶⁰ At this time, diversion-like programs had different names, but all were designed to free up the courts and, eventually, it introduced a therapeutic element designed to ensure people who underwent diversion did not come back. In the decade prior to government intervention restorative justice initiatives were already being practiced, albeit informally by community groups and individuals who worked in the justice system (but not necessarily with institutional support).⁶¹ The integration and subsequent proliferation of restorative justice initiatives into the justice system started in the 1990s on a national scale with the codification of community-based sentencing alternatives for adults called 'alternative measures' under section 717 (1) of the *Criminal Code* of Canada.⁶² The youth jurisdiction has introduced some of the most significant diversion and restorative justice-based programs, called extrajudicial measures, where the focus is far more on rehabilitation, and far less on deterrence through punishment, both pre-charge and post charge. In some provinces completely separate buildings are tailored to address youth justice, as well as health, housing and other youth related issues.⁶³ There are a number of indigenous run alternative measures program, something that has its history in the landmark case of *Gladue*. *Gladue* considered significantly how the Supreme Court should interpret s 718.2(e) regarding how or why indigenous people should be treated in a particular way,⁶⁴ the effect of which was not to give a 'native discount' but to incorporate more restorative and rehabilitative principles to guide the courts.⁶⁵

⁵⁹ see Kathleen Daly, 'Conceptualising Responses to Institutional Abuse of Children' (2014) 26 (1) *Current Issues in Criminal Justice* 5

⁶⁰ Interview with Judge Kofi Barnes on 23 October 2014. Justice Barnes was the former deputy director of the DPP in Ontario.

⁶¹ Barbara Tomporowski, 'Restorative justice and community justice in Canada' (2014) 2(2) *Restorative Justice: an International Journal* 218, 218-219

⁶² interview with Craig Giles on 6 October 2014

⁶³ I am grateful to Miriam Henry for extensive discussion on this issue. Interview on 20 October 2014

⁶⁴ *R v. Gladue* [1999] 1 S.C.R. 688. Grateful to Professor Scott Clark for wider discussion about access to justice

⁶⁵ discussion with Deven Singhal on 13 October 2014

3.2.2.2. Alternative measures aka Diversion

The alternative measures program is the codified diversion program in Canada. It has the effect of being a conditional discharge; if the person meets the various conditions then the charge is withdrawn. It can be given for a wide range of offences, but cannot be used for serious charges such as murder, manslaughter, aggravated assault (including sexual assault), kidnapping or offences involving firearms.⁶⁶ There are also a number of informal police diversion programs that vary across the country, including cautions, as well as tailored avenues for indigenous or First Nations people. Charges are approved by the Crown prosecution service, rather than by police who refers cases, and it is prosecution lawyers who appear at court.⁶⁷ I had the opportunity of visiting members of the judiciary, prosecution, academics and defence lawyers in Vancouver and was able to view court proceedings downtown as well as in a suburban court, Port Coquitlam. In Calgary, in spite of limitations that an electrical fire posed that week (where the court precinct had to be closed for 4 of the 5 days),⁶⁸ I had the opportunity of speaking to prosecution, Correctional services, and significantly had the opportunity to go to Tsuu T'ina Nation and speak to people running the peacemaking Tsuu T'ina Nation court (and later attended that court when electricity downtown was reinstated). In Toronto I met people who worked for the Aboriginal Legal Aid service, lawyers and social workers, who run a unique diversion program for First Nations people, prosecution as well as members of the judiciary, allied social services and academics. The following is split into categories of place.

3.2.2.3. Vancouver, British Columbia

The default position of prosecution in British Columbia is to consider first whether a person can undergo diversion rather than viewing it in terms of whether the allegation simply satisfies the elements of the offence.⁶⁹ Laid out in a Directive of the Attorney General on alternative measures, it reads: "not every person alleged to have committed an offence needs to be prosecuted. Alternative measures, which were introduced in the Criminal Code in 1996 as part of significant reforms to the criminal law, enables adults and organisation to take responsibility for offences in certain circumstances without going through judicial proceedings".⁷⁰ The effect of this approach, as was suggested to me by provincial court judges Judge Tony Spence and Judge David St Pierre, is that they rarely encounter the more minor matters, as prosecution and police effectively deal with such matters much earlier in the process, agencies that have tended towards a culture that emphasises restorative approaches rather than jail.⁷¹ Mr Craig Giles, who works as a Crown prosecutor in Port Coquitlam is a keen supporter of diversion programs and was involved as a prosecutor in the running of the Maple Ridge Diversion program which started in 1994 and

⁶⁶ see the list in Ministry of Attorney General (Criminal Justice Branch), *Crown Counsel Policy Manual: Alternative Measures of Adult Offenders* (October 12, 2010) British Columbia at page 3. This list appears to be supported nationally.

⁶⁷ interview with Judge Tony Spence and Craig Giles on 6 October 2014

⁶⁸ CBC News, 'Downtown Calgary electrical fire damage will take days to fix, require rebuild' <http://www.cbc.ca/news/canada/calgary/downtown-calgary-electrical-fire-damage-will-take-days-to-fix-require-rebuild-1.2796497> (Oct 12, 2014), accessed at 31 January 2015

⁶⁹ interview with Craig Giles on 6 October 2014

⁷⁰ Directive of the Attorney General issued under section 10(2) of the Director of Public Prosecutions Act, (March 1, 2014) *Public Prosecution Service of Canada Deskbook*, <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch08.html>, accessed at 31 January 2015

⁷¹ I am grateful to Judge Tony Spence, Judge David St Pierre and Craig Giles for discussion about the broader justice picture on this point.

was one of the first of its kind. Considerably cheaper to run than traditional criminal justice proceedings, Mr Giles believes that this program worked in particular as a model because of the community volunteers involved where the vested interest of the community was at the centre.⁷² When pressed on emerging areas of prosecuting, domestic violence, not traditionally an area covered by alternative measures, has been given special attention in his view, and while it is still evolving, prosecution are careful to distinguish the different kinds of domestic violence that exist:

1. Where any combination of: family, mortgage stress, stressing events or accidents, job insecurity can result in sudden violent events.
2. Long-term relationships categorised by a long history of violence, potentially accompanied by alcohol, drug use.
3. The new and young relationship with frequent violence, sometimes categorised by alcohol and drug use.

These sorts of offences, while not allowed under the alternative measures regime, are given unique attention and intervention that does not equate to an automated term of imprisonment as a solution.⁷³

Diversion programs, under alternative measures, for First Nations people in Vancouver emerged in the last decade. The Criminal Code allows for particular attention to be paid to aboriginal offenders under s 718.2 . It reflected a change in thinking from restorative to a transformative justice, in the sense that the latter seeks to transform actors in the process; placing actors in a space beyond rather than returning them to a prior point in time or space. Examples of indigenous tailored programs include cultural adjustments in diversion programs, for instance different language terms applied, special counselling programs, allowing people with prior criminal history to take part in alternative measures and informal diversion. I had the pleasure of spending some time with Alex Wolf who is the director of the Indigenous Community Legal Clinic in Vancouver who previously worked extensively in remote communities as a prosecutor in the north of British Columbia.⁷⁴ He suggested that diversion programs, similar to a police referred pre-alternative measures program, in remote areas were perhaps more effective because they were small and local, run by local justice committees comprising the elders, police, teachers and family. Many of these programs, however, are also informal because these remote communities, overwhelmingly First Nations People, lack funding and access to formal diversion and alternative measures programs.

There remain considerable challenges to access to justice for people in remote areas, not least the divide in understanding between the imposed colonial justice system and the complex myriad issues faced by First Nations people.⁷⁵ This was transmitted not least by the speeches and conversation I had with people at the Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence + Conference at the University of British Columbia while in Vancouver. It sought to address the ineffectiveness of justice systems, the real, lasting and lived effect of residential schools on First Nations people in Canada, and ways in which a “+” spiritual element to thinking about justice issues might be

⁷² interview with Craig Giles on 6 October 2014. See also Phil Melnychuk, '20 years: youth diversion still shining' *Maple Ridge News* (2 May 2014), <http://www.mapleridgenews.com/news/257575011.html>, accessed at 31 January 2015

⁷³ Interview with Craig Giles on 6 October 2014.

⁷⁴ Many thanks to Alex Wolf and Camran Chaichian for their hospitality and dedication to the fight for justice.

⁷⁵ Conversations with Alex Wolf on 8-10 October 2014

integrated.⁷⁶ Judge Joseph Flies-Away, in observing the behaviour of people who get in trouble with the law, said “criminals act like they have no relatives,” communicating the link between acts and families, individuals and communities in a way that resonated very strongly for me.

3.2.2.4. Calgary, Alberta

My arrival in Calgary was met with some of the challenges of urban life: electrical fires. Despite this I managed to get an insight into the role of Corrections in the alternative measures process, as well as insight from prosecution from a different part of Canada. I spoke to Mark Winterford, the Director of Community Corrections in Alberta, who said that Corrections largely have a referral function in Canada. Matters undergoing alternative measures get allocated to a probation officer who conducts an assessment, an existing person in the Corrections matrix. Occasionally volunteers and students assist them. Commonly a person undergoing alternative measures is required to undertake three main tasks during a three month period. If a person requires, for instance, further counselling, then they would ordinarily not be referred to alternative measures (although an extension of time is possible).⁷⁷ Costs relating to counselling or other health treatment are taken out of the Health Department budget rather than Corrections, or from private insurance. Mr Winterford was of the view that the system was an extremely effective one and that the cost of running the alternative measures programs was almost negligible given that it tapped into existing structures of supervision and other community based programs. He did not agree with my suggestion that certain challenges for indigenous people and people living in remote areas persisted, arguing that service provision for these groups and these areas was adequate. In his words, there were “no stumbling blocks to remote servicing”. He did emphasise, however, that there is a need for staff to be creative in order to make the system work, and that Corrections in its portfolio does seek to reduce the continued contact of an ‘offender’ with the justice system.

The alternative measures program is highly valued as a sentencing option for prosecution in Canada, and is not considered an easy or soft alternative. Crown counsel Deven Singhal firmly expressed his support for the program, and suggested that in Calgary, just as many other parts of Canada, alternative measures is almost always given to a first time offender as an automatic consideration (subject to it not being a serious offence). He said there is prosecution culture that allows room for mistakes, and that gives a person the benefit of the doubt, based on an understanding that the impact of a conviction or record is grave and significant, particularly where the person may have a disadvantaged background, which only adds to their struggle. The transition, he says, to the increased use of alternative measures and other creative ways of dealing with people who come into contact with the justice system, is reflective of the public: they need to see their values reflected in the sentence.

⁷⁶ My impressions from the speech by Judge Joseph Flies-Away from the Health and Wellness Court at Hulapai Tribal Nation, Arizona, USA on 9 October 2014. See www.wellnesscourts.org, and in particular a helpful PDF: <http://www.wellnesscourts.org/files/Unique%20Role%20of%20Judges%20in%20Healing%20to%20Wellness%20Court%20-%20June%205,%202013.pdf>. See also some discussion on residential schools and trauma in Daly, above n 59

⁷⁷ I am grateful for the time Corrections took in spite of the challenges they faced that week. Interview with Mark Winterford on 16 October 2014. My interview with Corrections was the only interview subject to an ethics screening, which was both an interesting and curious experience. I am nevertheless respectful of their operational requirements and appreciative of the time and effort they gave me.

Where this is absent, the corollary is one where people may apply extrajudicial sanctions in order to “see justice done.”⁷⁸

Due to the electrical fire, I was only able to attend court on Friday of that week. I spent the better part of the Thursday afternoon with Shelia Rabbitt, the Director of the Tsuu T’ina Nation/Stoney Corrections Society and Roxanne Crowchild, from the Office of the Peacemaker, who I had heard at the Therapeutic Jurisprudence + conference in Vancouver the week before. After speaking to me on the phone Ms Rabbitt drove out to pick me up and bring me to the Tsuu T’ina Nation reserve, giving me a very special insight into the space and feel of the Nation: vast grassy plains against the sharp jagged mountains in the distance inhabited by a few thousand people. The Corrections office is a specialised First Nations not-for-profit that works closely with Corrections Alberta and conducts most parole, supervision, alternative measures as well as peacemaking circles, and including with youth.⁷⁹ The office is located on the reserve, and is a rather unique establishment that looks more like a house than a correctional institution. It is run by people who are Tsuu T’ina people. Police on the reserve are also of Tsuu T’ina Nation descent (and have been for 20 years in a unique setup). There has been a courthouse on the reserve since 2000, but it is currently undergoing repair. As a result, court is run in downtown Calgary, in a special courtroom reserved for Tsuu T’ina nation matters. The Corrections society has a number of native court workers, just like in every province in Canada, who work at courts in urban areas as well as courts in remote communities. Shelia Rabbitt and Roxanne Crowchild emphasised the importance of building relationships with the community such that the justice process was less about prosecuting and more about trust.⁸⁰ The judge who presides over the Tsuu T’ina nation court must also be a First Nations judge. It will also be expanded to a full court in the future, not only a sentencing court.⁸¹

3.2.2.5. Peacemaking as diversion

Roxanne Crowchild is one of the Peacemakers who run a unique program in Tsuu T’ina whereby people are referred to them to engage in ‘peacemaking,’ which is similar to circle sentencing.⁸² The program receives federal government funding, and is part of the Aboriginal Justice Strategies framework. Future funding, however, remains uncertain. The effect of participation is that the person enters into a ‘peace bond’ and can depart court with no criminal record. In practice, people charged are referred after an appearance at court and with the approval of the prosecution. A peacemaker, often Ms Crowchild, sits in the circular court and takes note of any referrals. Should there be some dispute around who should be referred, the parties can appear before the judge with submissions, who then makes the final determination. Sometimes police refer cases for peacemaking without referring the matter to court, such is the strength of the program. It is primarily for summary offences, and only a few indictable matters would be referred, such as an attempted burglary but where there was

⁷⁸ Ever indebted to my friend Deven Singhal for his time, thoughts and hospitality during my week in Calgary.

⁷⁹ This was negotiated with the Alberta government in 1981 and developed out of a tripartite agreement – funded initially for ten years, then every two years or yearly. Tsuu T’ina Nation is a Treaty 7 Nation.

⁸⁰ Interview with Shelia Rabbitt and Roxanne Crowchild on 16 October 2014.

⁸¹ There are a number of First Nations judges, some of whom can conduct court in First Nations languages, but there is still a need for more First Nations judicial officers.

⁸² Interview with Roxanne Crowchild on 16 October 2014. Also see Tony Mandamin, Ellery Starlight and Monica Onespot, ‘Justice as Healing: A Newsletter on Aboriginal Concepts of Justice: Peacemaking and the Tsuu T’ina Court’ (Spring 2003) 8(1) *Native Law Centre* 1

no actual entry into a premises. Ms Crowchild said there are lots of tears shed in peacemaking, and that getting people to talk together in their own community with a Peacemaker as mediator is an effective diversionary process. An example was a group of boys who broke into a shop and stole 'pop,' the Canadian equivalent of soft drink, and chips, but who also damaged a computer in the process. The peacemaker went out to meet the boys as well as the woman running the store and held a circle. The punishment handed down was shovelling snow in the wintertime outside the store. When the peacemaker conducted a follow-up session with the boys involved they were surprised to find a further nine boys present who admitted to breaking into other stores, and that they wanted to participate in peacemaking on their own volition.⁸³ At the end of the process, a report is written to the court, and the documents containing the referral, notes and observations are then ceremoniously burnt.

3.2.2.6. Toronto, Ontario

The Aboriginal Legal Services of Toronto (ALST),⁸⁴ which runs diversion programs for First Nations people called the community council, has a unique advantage over most diversion programs; the charges a person faces are withdrawn after they are referred to the ALST, rather than upon completion of the program. I met Jonathon Rudin, the Program Director of the ALST, who said this is because of a special relationship the ALST has with prosecution that has been in place since 1992. The setup has the advantage that the person is not on bail, i.e. it is less about satisfying court mandated requirements. When this protocol was first negotiated in 1992, there were only a few limits to the type of offences that could be referred. Domestic violence, sexual violence and impaired driving charges, as well as murder or manslaughter could not be referred.

The ALST currently accepts First Nations people for all manner of minor offences and includes assault, bodily harm, and assault with weapon charges. It also accepts people with a prior criminal history, which has the effect of, among other things, ensuring that those with a history before the introduction of diversion can also benefit.⁸⁵ Referral is commonly conducted between the prosecution service and a native court worker who only discuss the person's prospects for diversion. They do not discuss the facts or the legal strength of the case. When a person is referred they do not undergo an assessment as such. Mr Rudin suggested to me that many assessments are bound by a particular set of cultural values, and that diagnostic test or popular risk assessment tools 'package' people into categories that may not necessarily be constructive for First Nations (or anyone). It would follow that this process should be resisted precisely because the current justice system does not work: you cannot know what might work and so leave it open.⁸⁶ It is more about dialogue, and people who are referred attend community council meetings as part of their diversion. It can be a long process, and people who leave the program, but do not complete, are still able to return.

⁸³ Their participation was not subject to court intervention. Thank you Roxanne and Shelia for your many stories.

⁸⁴ The Legal Service is comprised of two corporate entities: Legal Aid Ontario funds the legal advocacy arm with social workers, lawyers and largely deals with civil matters. They do not run criminal or family matters. The second arm is comprised of the aboriginal court work program, community council program and child alternative dispute resolution. This arm is funded by various government departments. The ALST also runs education sessions for prosecutors and other agencies where appropriate.

⁸⁵ Interview with Jonathon Rudin on 22 October 2014

⁸⁶ I appreciate your comments Jonathon Rudin on this point.

There are approximately 40 council members who oversee the community council. The meetings are scheduled three months in advance and the members must have ties to the community. There is a mix of social workers, lawyers and other members of the community who sit on the council. Council members are not paid, but are given transport vouchers and food or gifts for their contribution, which is approximately one to three hearings per month. At the meeting, the person referred sits down with them and talks through goals that they come up with related to their lives.⁸⁷ Caseworkers for the ALST Helen Young and Bronson Bob recounted that offences often tell a story: a theft of bottles of alcohol can mean dependency, poverty, or social dysfunction. It is these stories that are addressed in this kind of diversion. When the question was put about the benefit to a first time offender as compared to someone with history, Ms Bronson's experience was that there was no particular pattern between a person with a long criminal history and a first time offender: it is more about where people are at in their struggle.⁸⁸

3.2.2.7. On remoteness and resources

I met Professor Scott Clark from Ryerson University while I was in Toronto. We discussed diversion programs at length and he had particular expertise on the Northeast Territories and Nunavut in Canada's north. While I did not have the opportunity to go to these areas, the North-West Territories runs circuit courts not dissimilar to those in the NT. They also have a pre-charge diversion program involving community justice panels that was set up in Nunavut in the North West Territories in the 1980s, but this has proved a challenge.⁸⁹ It followed a process of cases being referred to a community justice panel. The hearing was run in a local language, was not recorded and only a few notes are taken by an administrative person. The effectiveness of this model, however, is limited by the willingness of the mainstream justice system's ability to include it. It so often depends on police personalities, just as many programs, government funding, policy guidelines, as well as the high turnover rate of lawyers and staff who struggle with relatively low wages.

3.2.2.8. Some restorative justice initiatives.

If a First Nations person is facing serious charges in Toronto they can be referred to the Gladue (Aboriginal Persons) court, a court that emerged out of the Gladue case mentioned above, which has a restorative justice underpinning in the sense that it is culturally tuned to the participants.⁹⁰ The Gladue court is supposed to combat the overrepresentation of aboriginal people in custody, and while it appears that overall rates of people incarcerated are decreasing, the rates of aboriginal people in custody are sadly increasing, despite the Gladue decision.⁹¹ I had the opportunity to see the Gladue court in action where a young man was in custody. The ALST prepares court reports for this particular court after a guilty plea has been entered (or if the person is found guilty) and where a person may face a term

⁸⁷ Interview with Helen Young and Bronson Bob on 22 October 2014

⁸⁸ interview with Helen Young on 22 October 2014

⁸⁹ interview with Professor Scott Clark on 20 October 2014; see Scott Clark, 'The Nunavut Court of Justice: An Example of challenges and Alternatives for Communities and the Administration of Justice' (2011) 53(3) *Canadian Journal of Criminology and Criminal Justice* 343

⁹⁰ R v Gladue [1999] 1 S.C.R. 688

⁹¹ interview with Professor Scott Clark on 20 October 2014

of imprisonment. The court has its own courtroom, separated from the mainstream and has a host of expertise in a range of programs and services available to First Nations people in Toronto.⁹²

Another restorative justice initiative is in the form of an integrated domestic violence court in Toronto where family and criminal law proceedings can be merged into one courtroom. For instance, family protection and assault matters can be combined, allowing for a more holistic way of dealing with the interconnected issues of domestic violence.⁹³ Interdisciplinary service providers, such as the Native Child and Family Services of Toronto agency, also offer First Nations people in Toronto a variety of programs that can be referred through courts or through welfare services, such as positive parenting, domestic violence education, and family services. The agency is an amazing space and offers a sweat lodge, roof top garden with native grasses (including sage for smudging), an emphasis on warmth and homeliness in its architectural layout, as well as a day care service, pre-and-post natal services, education and other health services.⁹⁴

Other examples of diversionary restorative justice programs in Canada that I was able to observe include the Downtown Community Court in Vancouver thanks to Judge St Pierre. Its jurisdiction is limited to the Eastside part of downtown Vancouver where the community is characterised by poverty, disadvantage, mental health issues and drug use. It is considered to be a successful model in a less adversarial court process. Many people who go through this court process undergo alternative measures also.⁹⁵ In addition there is a Drug Court for people with significant drug addiction difficulties.

⁹² interview with Jonathon Rudin on 22 October 2014

⁹³ interview with Taunya Paquette and Adit Sommer-Waisglass on 22 October 2014

⁹⁴ Thank you to Taunya Paquette for taking the time to show me around this fantastic building.

⁹⁵ See Ministry of Justice, 'Report from the DCC Executive Board on the Final Evaluation of the Downtown Community Court' (30 September 2013)

3.2.3. South Africa

3.2.3.1. A very brief contextual history

South Africa, a colourful mix of cultures, is emerging from a troubled half-century of state-sanctioned violence, racial segregation and oppression. Under apartheid, non-white South Africans were forcibly located into separate designated areas, townships or reserves. The *Population Registration Act* 1950 provided the legislative framework for apartheid by classifying all South Africans by race, which included Bantu, coloured, indigenous, Asian and white. Afrikaans was imposed as the language of instruction in schools. In some cases these classifications divided families and split communities. It also made intermarriage unlawful and restricted the movement of people by allocating separate facilities on the basis of race.⁹⁶ The economic reality was one of extremes and South Africa still has one of the highest Gini Coefficients in the world.⁹⁷ Protests and resistance to the apartheid system mobilised in enormous proportions, and international condemnation of apartheid was widespread, but it was not until 1994 that the apartheid system was abolished.

The legacy of this divisive history is visible and South Africa is still coming to terms with how to reintegrate its community. Under apartheid, South Africa adopted a British common law system combined with aspects of Dutch law, and the overwhelming majority of the judiciary were white Afrikaans-speaking (men). In a post-apartheid democracy, considerable efforts were made to increase racial and gender diversity in the judiciary. Today the judiciary is far more reflective of the racial make-up of the community, although challenges in balancing community representation on the one hand, and competence and skill on the other, have not been insignificant.⁹⁸

3.2.4. Diversion in South Africa

As in many countries, diversion programs developed in South Africa initially for youth and children who came into contact with the justice system in the 1990s. What South Africa did not have was a separate jurisdiction for youth and children. Lobbying for diversion took place alongside the lobbying for a separate youth jurisdiction, which came into effect under the *Child Justice Act* 75 of 2008. It has been described as one of the best pieces of child justice legislation in the world.⁹⁹ Diversionary and restorative justice processes are at its centre and there is an emphasis on keeping children out of the formal court processes.

⁹⁶ I was fortunate enough to visit the apartheid museum in Johannesburg; an invaluable historical, cultural and political resource and a testament to a nation with a remarkable civil rights movement.

⁹⁷ South Africa is at approximately 65. Gini coefficient being the measure of inequality of income distribution where zero represents absolute equality and 100 is absolute inequality. Australia is at 35, Canada at 33 and New Zealand is at 36. See GINI index (World Bank estimate) <http://data.worldbank.org/indicator/SI.POV.GINI>, accessed 1 February 2015. The Northern Territory has the highest relative gini coefficient in Australia <http://censusstats.blogspot.com.au/2012/07/income-distribution-in-australian-states.html>

⁹⁸ Thank you to Venessa Padayachee and Dion Reuters for week long discussion on this point. See also : Penelope E Andres, 'The South African Judicial Appointments Process' (2006) 44(3) *Osgood Hall Law Journal* 565, 567

⁹⁹ Hema Hagovan, 'Child Justice in Practice: The diversion of young offenders' (June 2013) 44 *South Africa Crime Quarterly* 25

Non-governmental organisations were pivotal in the development of diversion. NICRO (National Institute for Crime Prevention and the Re-Integration of Offenders) is one such organisation that I visited in Cape Town. It was the first organisation to conduct diversion programs in South Africa. NICRO was formed in 1910 as an organisation to assist prisoners and has evolved to assist people in all stages of the justice system. It has over 50 service locations and runs diversion programs, for children and adults, non-custodial sentence supervision and parole supervision (much like NAAJA's Throughcare program).¹⁰⁰ It is comprised of culturally diverse social workers and an advocacy team.

NICRO was conducting around 30,000 diversion cases per year for children in the 13 years prior to the enactment of the *Child Justice Act*.¹⁰¹ These programs were funded by grants obtained from the Netherlands government and agencies like CordAid.¹⁰² NICRO had a special relationship with the prosecution service and negotiated referrals to NICRO for children between 10-18 years in exchange for a withdrawal of charges upon completion of the program. The development of this relationship was assisted by the recruitment by NICRO of former prosecutors such as Deon Ruiters. I got a chance to meet Mr Ruiters, who has returned to prosecuting at the Wynberg Magistrates Court. He previously worked as a prosecutor at Mitchells Plain for a few years and then saw an opportunity to work at NICRO with a vision for making a difference in the area of child justice. Having a relationship with the prosecution was not enough, however, as approvals of diversion still relied heavily on the opinion (and prejudice) of the prosecution. Mr Ruiters, other NICRO employees and non-governmental organisations such as Black Sash,¹⁰³ lobbied and campaigned for the introduction of a youth jurisdiction and the codification of diversion programs.¹⁰⁴ They saw this as a way to better protect the rights of children and to ensure a more uniform access to diversion programs.¹⁰⁵

The diversion programs NICRO runs includes youth empowerment programs that looked at life skills, conflict resolution and decision-making, community service, victim offender mediation, family group conferencing and special programs for high-risk youth that includes vocational training and a wilderness 'rites of passage' type program and mentoring. The period of diversion varies from 6 weeks to 12 months depending on need. It is entirely separate from the police or prosecution system.¹⁰⁶ Once diversion for children was legislated, government service providers took over a considerable part of the running of diversion programs. NICRO is the accredited training agency and has provided significant training to government providers. A probation officer from the Department of Social Development now assesses the child for suitability within 24 hours of arrest (and appearance at court) and the child is then referred to a variety of services that have sprung up to conduct diversion. Due to the volume of cases the reports produced by probation officers are sometimes too brief, and if NICRO is referred a child, they often conduct a further assessment. There is a shortage of social workers in South Africa which has produced some challenges in dealing with the workload, and resource constraints in remote areas mean that children often have delayed access to probation officers and service

¹⁰⁰ Throughcare is a pre-release parole program for indigenous people run by NAAJA.

¹⁰¹ interview with Venessa Padayachee on 13 November 2014

¹⁰² The non-custodial sentencing program receives funding from DFID UK.

¹⁰³ See www.blacksash.org.za

¹⁰⁴ Catherine Wood, 'Diversion in South Africa: A review of police and practice, 1990-2003' (October 2003) 79 *Institute for Security Studies* 1, 1-2

¹⁰⁵ Interview with Deon Ruiters on 14 November 2014; interview with Venessa Padayachee on 13 November 2014

¹⁰⁶ interview with Venessa Padayachee on 13 November 2014; interview with Arina Smit on 14 November 2014

providers. There is also some suggestion that diversion for children has decreased in total numbers, though the reason for this remains unclear.¹⁰⁷

3.2.4.1. Adult Diversion in South Africa

After the success of the children and youth diversion, NICRO turned its efforts to adult diversion. Adult diversion for low level offences in South Africa remains unlegislated but is an active part of the sentencing process in South African courts. Based essentially on the children's court model, adults can be referred to NICRO at the first appearance stage or during the course of the proceedings.

I had the opportunity to accompany one of NICRO's social workers to court in Cape Town, Linda SURNAME, and observe her carry out preliminary diversion assessments. She had a desk in the prosecutors' room with a pile of files, which were either referred to her by prosecution, legal aid lawyers or private lawyers. The programs she was assessing people for were mostly drink driving offences, a program which has received considerable funding. The NICRO Khayletisha and Mitchells Plain offices, which are located in areas which were designated as 'coloured townships' during apartheid, also run sophisticated diversion programs for drink driving offences. They accept people who have blood alcohol readings of 0.06-0.20. The charges are usually adjourned for 3-6 months and the person charged is required to undergo a variety of programs depending on their needs, including an assessment of risk and resilience factors.¹⁰⁸ It could be a driver education program that takes approximately 5 days, facilitated by NICRO, transport department representatives, and police, and then a follow up session to assess behaviour change. Other programming includes specialised programming that looks at the causes behind reckless or negligent driving. I spent two days in these townships and I am grateful for the time that social worker Tobeka Zazini and manager Rene van Staden took to introduce me to important actors in the program and to show me the office and facilities.¹⁰⁹

At present, diversion programs run by NICRO are overwhelmingly for driving offences. Previously theft and burglaries represented a considerable portion, as well as violence offences, but a huge backlog in drink driving and driving related offences has meant there is an urgent need for these matters to be addressed as priority. Perjury cases, dealing in liquor offences (selling without licence), common assault, 'low level' domestic violence, substance abuse (but not trafficking) and assault occasioning grievous bodily harm are all offences that can be dealt with through diversion programs.¹¹⁰ Often these cases require negotiation between defence lawyers and prosecution. Khulisa is another not-for-profit that runs diversion programs. A tiny office operating out of Mitchells Plain, they have a focus on domestic violence, mediation for adults, as well as diversion programs for children.¹¹¹

¹⁰⁷ interview with Venessa Padayachee on 13 November 2014; interview with Arina Smit on 14 November 2014

¹⁰⁸ interview with Zalisile Wonci on 18 November 2014

¹⁰⁹ interviews on 17-18 November 2014. Also interview with Zalisile Wonci on 18 November 2014

¹¹⁰ interview with prosecutor Ms Benwell on 19 November 2014

¹¹¹ interview with Lisa Prins on 19 November 2014. See also Hema Hagovan, 'Child Justice in Practice: The diversion of young offenders' (June 2013) 44 *South Africa Crime Quarterly* 25

The ability to evaluate diversion programs in South Africa is challenging, although most people I spoke to were sure that the efforts put into first time offenders was worth it.¹¹² There remain challenges with working with children (and adults) who are homeless, as ongoing contact and communication is sporadic. Funding is forever a constraint, but with grants of aid from overseas aid agencies NICRO at least is able to develop programming. NICRO has also diversified its income sources and has generated income through training and accreditation programs as well as counselling services for the public and private sector. It owns real estate and assets and is considering plans for development above its premises to generate income to support its diversion and other programming.¹¹³ Employment of a wide cultural diversity of social workers minimises language and communication challenges, and while remote areas remain challenged with limited resourcing, NICRO and other agencies have a wide mandate and have many field offices that seek to service these areas.

3.2.4.2. Restorative Justice initiatives

Referral to non-custodial sentencing, which is similar to supervision and therapeutic interventions by Corrections Departments in other countries, is a diversionary or restorative justice type sentencing option available to someone at risk of imprisonment.¹¹⁴ NICRO also runs intimate partner programs under non-custodial sentencing, including accessing tribal leaders where they are involved, but these programs are complex and there are some challenges in handling both victim and offender. In regional areas, NICRO also assists in traditional courts where women are not allowed to represent themselves: NICRO has negotiated female social workers to appear on their behalf. Ever the advocating agency looking for new ideas, NICRO is now working on a project to address the criminal capacity of children aged 10-14 and to increase the age of responsibility to 14 years in line with research on brain and social development.¹¹⁵

¹¹² Every person I spoke to at NICRO echoed this sentiment. As did prosecution.

¹¹³ Interview with Betzi Pearce operations manager 20 November 2014

¹¹⁴ interview with Regan Jules-Macquet 20 November 2014

¹¹⁵ interview with Venessa Padayachee on 13 November 2014; interview with Arina Smit on 14 November 2014

3.3. An overview of Restorative Justice initiatives in Europe

Countries such as Germany, Belgium, and the Netherlands are interesting examples of places where there is strong support for restorative justice research as well as practice. These countries employ a civil law, as opposed to a common law, system of justice. While indigenous peoples are not a demographic their justice systems interact with, multiculturalism and the challenges of (sometimes) competing belief systems, as well as cultural and legal knowledge are. The increasing importance of restorative justice in Europe is demonstrated by its wide application to both the different stages of the justice system and conflicts in institutions such as schools. Looking at the way in which other jurisdictions in the world tackle justice, meant in the sense of addressing the consequences of crime as well as making efforts to limit its appearance, provides more than curious insight. In the words of Wexler: “once you begin thinking of the law less in terms of rules and more about various legal arrangements and therapeutic outcomes, you become less wedded to thinking of the law as a purely domestic discipline”.¹¹⁶

3.3.1. Schleswig-Holstein, Germany

Of the sixteen domestic jurisdictions in Germany, Schleswig-Holstein is known for its low rates of convictions and high rates of mediation and victim-offender conferencing. It has the lowest incarceration rate in the country.¹¹⁷ I met Joachim Tein and Jessika Hochmann from the Department of Justice and Bjorn Suess from the non-governmental Taeter-Opfer Ausgleich (victim-offender mediation agency). In Schleswig-Holstein, pre-charge diversion is run by police. The default position of prosecution is whether someone first should attend mediation, receive a fine or complete community work. Only prison sentences of 90 days or more are actually recorded on a person’s criminal history. If a fine is imposed, it is calculated in a formula that incorporates a person’s income. There is also a special provision whereby a judge can refer 18-21 year olds to the juvenile court if the offence committed is trivial and characterised as immature, a decision that is facilitated by way of a report from social workers present at court. The mediation conducted by organisations such as the Taeter-Opfer Ausgleich reflects a holistic approach that is not considered in paradigms of ‘programs’. Mediation and victim offender conferences are considered more as a pathway, philosophy or transition.¹¹⁸ Mr Tein, Ms Hochmann and Mr Suess’s overwhelming view was that while rates of success are difficult to measure, it is important to consider them in light of a balance of: victim satisfaction, community opinions on safety, the rates of re-offending both in terms of frequency as well as seriousness (of the repeat offence). A significant observation is that there is probably the same number of people in jail for more serious offences but fewer people are in custody for minor offences. This is primarily because of the

¹¹⁶ David Wexler, ‘Two Decades of Therapeutic Jurisprudence’ (2008) 24 *Touro Law Review* 17, 18. I was unsuccessful in organising meetings in London (other than Heather Strang by telephone) and as such have not included the UK in the discussion as a stand alone point. I have, however, drawn on Dr Strang’s insight through out this report.

¹¹⁷ figures around 40:100000. Germany as a whole has incarceration rates of 86:100000 and the USA 300:100000

¹¹⁸ There is, of course much more to say on this topic, and I am grateful for the time Mr Tein and others took to meet with me. Interview on 31 October 2014

availability of alternative sentencing options, and perhaps due also to their effectiveness (and fewer people exposed to the justice system).

3.3.2. Leuven, Belgium

Belgium is home to the European Forum on Restorative Justice (EFRJ), located in Leuven, and a considerable amount of research is conducted in conjunction with a number of universities in Europe. I was invited to sit in on a regular meeting of the EFRJ and I am grateful to Inge Vanfraechem for this opportunity.¹¹⁹ Restorative justice programs in Belgium are longstanding for both youth and adult and emerged from pilot programs run by non-governmental organisations in Flanders and Wallonia. In the early 1990s victim-offender conferences and family group conferencing were increasingly incorporated into the legal sector. Restorative justice initiatives are legislated and their application extends more serious offences.

3.3.3. Utrecht and Amsterdam, The Netherlands

Restorative justice in the Netherlands, much like its neighbour Belgium has a significant support base in academia and in civil society groups. Compared to Belgium, however, it is not popular in government circles. Despite this, victim-offender mediator programs run for both adults and youths in the justice system, and there is an emphasis on therapeutic interventions in the justice system. I met Dr Annemieke Wolthuis and Dr Renee Kool of the University of Utrecht, both of whom have conducted considerable research on restorative justice in Europe.¹²⁰ We discussed at length the cultural challenges that the Dutch community is grappling with, as well as the bottom-up community conferencing programs that are emerging, particularly through community groups affiliated with schools to deal with conflicts in multicultural schools where there is tension between cultural minority groups from outside of Europe. This more neighbourhood-style mediation approach is based on the premise that the next generation will have the expectation that they can deal with conflict in a different way.

After learning so much about the beneficial consequences of restorative justice and diversionary models, I decided to attend Restorative Justice mediation training in Amsterdam. The course I did was run through the International Institute for Restorative Practices.¹²¹ Also known as the people who advocate 'one justice,' I found their approach to justice very singular indeed. Led as a series of sessions looking at restorative justice in schools I was disappointed at the response from the trainers who appeared bewildered that people might stumble on different definitions and understanding of concepts of 'thought', 'ideas' and 'feelings'. What I learnt from the overtly (American) cultural overtone was that a mono-cultural approach produces a 'sameness' to restorative justice practice (all questions in a mediation must be put in 'x' manner) which *must* be ineffective and we should all be wary of that.

¹¹⁹ meeting on 4 November 2014

¹²⁰ interview on 7 November 2014. Thank you very much for the wealth of information you gave me.

¹²¹ Found here: <http://www.iirp.edu>

4. CONCLUSION

4.1. Summary of approaches

New Zealand	<ul style="list-style-type: none"> • Multistaged pre-charge diversion run by police • Diversion programs have been developing for adults over the last 20-30 years • Pre-charge <i>iwi</i> justice panels for Maori people • Diversion referrals post-charge at court stage: police referrals to community services, restorative justice conferences • Restorative justice conferences are now legislated– for serious offences as part of community based sentencing, or terms of imprisonment • Restorative justice conferences, as well as <i>iwi</i> justice panels, are run by the not-for-profit sector • Restorative justice practices are being used in education, defence and the justice system. • A new Chair in restorative justice at Victoria University in Wellington • Significant funding has been put forward for restorative justice practices in NZ
Canada	<ul style="list-style-type: none"> • Diversion, known as alternative measures, is legislated in the federal Criminal Code under section 717 • It has been around for the last 25 years • Prosecutors must consider suitability for alternative measures as first step • Alternative measures usually requires a court appearance before referral • Department of Community Corrections oversees the referral process for alternative measures to external agencies such as counselling, drug and alcohol services • Peacemaking in the Tsuu T'ina Nation court is an indigenous diversion program for Tsuu T'ina Nation people • The specialised Downtown Community Court can refer people to alternative measures • Aboriginal Legal Services Toronto has a unique relationship with prosecution who withdraw charges once a person is referred to the community council (not upon completion) • Funding is limited, although many community organisations run programs • Remote areas continue to suffer disadvantage and in some areas lack culturally specific services
South Africa	<ul style="list-style-type: none"> • Diversion for adults is being run mostly by not-for-profit agencies and has been around for the last decade at least

	<ul style="list-style-type: none"> • Diversion for children has been legislated since 2008, although programs have been running for some 20 years • Diversion is a post-charge program and requires a court appearance • Not-for-profit agencies include NICRO and Khulisa • Funding for diversion comes from a combination of government sources and international aid. • NICRO is developing alternative funding sources to fund its diversion and non-custodial sentencing programs (such as through training, asset building)
Germany	<ul style="list-style-type: none"> • Emphasis on restorative justice practices countrywide. • Victim-offender conferences are commonly used in Kiel. • Judges can refer a person aged 18-21 to the children's court if their offending is immature so that they can be sentenced as a child.
Belgium	<ul style="list-style-type: none"> • Victim-offender conferences have been a feature of the justice system for more than 20 years. • Restorative justice research is extensive at university level and by government • Judges can refer a person aged 18-21 to the children's court if their offending is immature so that they can be sentenced as a child. • The European Forum for Restorative Justice has its head office in Leuven.
The Netherlands	<ul style="list-style-type: none"> • Community organisations run restorative justice conferences in conjunction with justice system as well as in multicultural schools • Significant research being conducted at university level • Government slower in support of restorative justice practices than European neighbours • Judges can refer a person aged 18-21 to the children's court if their offending is immature so that they can be sentenced as a child.

4.2. Recommendations for Diversion

1. Diversion in the NT should be developed for adults and culturally specific diversion programs should be developed for indigenous people.
2. The effect of diversion should mean that there is no criminal history. If it is pre-charge it should not appear on antecedents.¹²²
3. Diversion programs should engage community groups. They should be developed, run and owned by indigenous people and indigenous organisations.
4. Diversion should be limited to minor offences but could be given to people with a prior history.
5. Diversion could be pre or post charge but should be run by agencies other than police and government services.
6. Police involvement in the direction of diversion should always be alongside community groups.
7. The *Sentencing Act* should be amended to include diversion for adults in the sentencing regime.
8. Diversion programs should be distinct from other sentencing options. Fines and community work should not be the common feature of diversion, as they already exist as standalone sentencing options.
9. In some minor cases diversion will be more about exercising prosecutorial discretion not to charge (to decrease the intervention of the state).
10. Magistrates and judges should have discretion to order diversion, not just police or prosecution.
11. Department of Corrections could be utilised as a referral service, adding an insignificant workload and drawing on existing services and infrastructure.
12. Community organisations currently offering support services could incorporate a coordination role for referrals. Shires in remote communities could act as information sources for referrals.
13. Discussions with elders in communities as to the kind of ceremonies, cultural activities and family engagement which could be included in diversion should be undertaken.

¹²² In the NT prosecution keep both criminal priors (offences a person has pleaded guilty to) and antecedents (a record of every charge, including warrants, withdrawn and not guilty findings)

4.3. Concluding thoughts: tears of justice

Don't call me an alcoholic, a violent offender, a drug addict. Don't call me a program.

These words were expressed by a member of the audience during the Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence + Conference I attended in Vancouver. Uttered in response to discussion of the increasingly complicated web of options, programs, alternative sentencing, I understood this comment to be a reminder not to over-categorise and classify people who come into contact with the justice system. To do so is to reproduce a system of rules, order and labels that not only fails to identify different needs and circumstances, but stifles creativity. In the same way, it is important not to romanticise different ways, including indigenous ways, of 'doing justice,' be it for diversion or otherwise.

With that in mind, the best diversion programs I encountered were grass-roots; from the soul outwards. A diversion program for indigenous adults in the NT must be community managed, run and owned. This Fellowship experience, and the people I met, reminded me that it was necessary to be challenged by the consequences of my own research. My role, as a non-indigenous person, must be limited to advocating for, promoting ideas and connecting people and to be more aware of the need for community agency. Working in and drawing on the institutional knowledge of NAAJA, as an indigenous justice agency, could be one way of doing this. Or there may be a way that other community organisations could take a lead in the way that diversion could be developed, together with indigenous communities, as well as other parts of the justice system such as prosecution. As observed by Judge David Carruthers, it is far easier to influence prosecutorial discretion than it is to change the law.¹²³ But advocating for an amendment to the *Sentencing Act* is one most certain way of protecting fledgling diversion programs against changing governments (and policies).

The 'outrage' that people experience in response to crime still lends people to think that incarceration, as the ultimate punishment and greatest deterrent, is the answer.¹²⁴ Whatever your philosophy on deterrence might be, it is clear that many countries have engaged in and implemented other forms of sentencing so as to reduce the number of people who end up incarcerated, with a focus on reducing indigenous overrepresentation. By doing so those countries also seek to improve (and better include) the victim and the community in the justice system. Extensive investment in diversion and restorative justice approaches is a world-wide phenomenon. Diversion for first time, low level offences is considered cost-effective in New Zealand, Canada and South Africa, such that the argument around cost is just no longer part of the dialogue: it is an accepted fact. But the cost saving argument will only work if significant efforts are made to look at alternative sentencing such as diversion.¹²⁵ Experiments with social returns on investment and alternative funding sources are

¹²³ interview with Judge David Carruthers, 29 September 2014

¹²⁴ interview with Heather Strang on 6 November 2014

¹²⁵ When looking at the cost of prison, approximately 90% of prison costs are fixed. A greater intervention is needed to ensure this cost effectiveness can be realised. John Howard Society of Alberta, *Community Corrections Report* (1998), <http://www.johnhoward.ab.ca/pub/C29.htm#reduction>, accessed 31 January 2015

underway,¹²⁶ such as NICRO's entrepreneurial arm, to reduce control by government. I cannot resist the observation that this determination to establish 'value for money' is very much another example of compartmentalising knowledge.¹²⁷ Effectiveness can and must also extend to the increased satisfaction of victims and communities that comes with restorative justice, including diversion, a thing difficult to quantify but invaluable to measure.

Restorative justice has been introduced in diverse fields such as schools, government, business defence forces as well as the criminal and civil justice systems in New Zealand and parts of Europe, and is considered the most cutting edge way to resolve disputes, promote healthy workplaces and break the silence that might fester as a result of poor communication. It might be that the remedy for conflict does not lie in the justice system as it stands. But what this does suggest is that a future generation will grow to expect a certain kind of dialogue and engagement when they are wronged or do wrong. Critics of this approach warn of a growing state control in this area.¹²⁸ Either way, the justice landscape has an increasingly interdisciplinary future. As Judge Flies-Away said, "there is a caveat to justice: peace is not perpetual,"¹²⁹ and must adapt to changing time, place and culture.

The departure lounge at Johannesburg airport has a large wall length poster that advertises the number of restorative justice conferences the Department of Corrections has undertaken to 'break the cycle of crime,' a great indicator of progress in a country emerging from apartheid and charging towards modernity. This advertisement is interesting as it casts South Africa's justice system as one that understands restorative justice as integral to the criminal justice system, rather than alternative to the mainstream system. Frequently diversion, restorative justice, alternative measures and indigenous courts are spoken of as 'alternative to' the criminal justice system. The lens of justice ought to be viewed through a restorative perspective, to maintain worth, value and to ensure there are not two tiers of justice.¹³⁰ It is this message that I was left with as I boarded the final flight of my Fellowship: to look again at the different kinds of diversion and restorative justice programs out there and consider them not as separate but as integral to the criminal justice system, as it must be.

¹²⁶ Tomporowski, 221

¹²⁷ Cunneen and Rowe, above n 19, 56-57

¹²⁸ See John Howard Society of Alberta, above n 125

¹²⁹ Conference speech, 9 October 2014

¹³⁰ Special thanks to Venessa Padayachee for her thoughts on this point, interview on 14 November 2014

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