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Exploring Indigenous and non-Indigenous Sentencing in Queensland

For the Indigenous Criminal Justice Research Agenda
Department of the Premier and Cabinet
State of Queensland

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TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

Executive Summary

In Queensland, on the 19th of December 2000, the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* (Justice Agreement) was signed. The aim of the Justice Agreement is to reduce the rate of Indigenous people coming into contact with the criminal justice system, and to achieve a 50% reduction in the rate of Indigenous incarceration by the year 2011. The first independent evaluation of the Justice Agreement was undertaken in 2005 (Cunneen, Collings and Ralph, 2005). Recommendation 7 of this evaluation proposed the development of an Indigenous Criminal Justice Research Agenda to address the deficit in our understanding of key factors associated with Indigenous offending and victimisation; to identify how the system can effectively respond to these issues; and to drive policy initiatives.

One of the research priorities highlighted through the Indigenous Criminal Justice Research Agenda was an examination of sentencing disparities between Indigenous and non-Indigenous defendants before Queensland Courts - *The Sentencing Disparities Project*. The following project questions were specified:

1) Do sentencing outcomes for Indigenous youth and adult offenders differ from those for non-Indigenous youth and adult offenders?
2) Is sentencing disparity evident across the spectrum of sentencing outcomes?
3) What individual, social, court process and correctional factors influence sentencing outcomes, and do these factors differ for Indigenous and non-Indigenous offenders?
4) Are there different views about what constitutes aggravating and mitigating factors in sentencing Indigenous offenders?

This report presents research findings from *The Sentencing Disparities Project*. To answer the research questions posed above, formulate recommendations for future policy development and research to enhance Indigenous defendants' experiences and outcomes at sentencing, the project relied on a range of data sources and analytical procedures including:

1) a literature review,
2) statistical analyses of sentencing data,
3) surveys of judicial officers and police prosecutors,
4) interviews/focus groups with Indigenous community justice groups,
5) informal discussions with other key stakeholders.

The review of the literature (see Chapter 1) starts by examining initial baseline differences in the sentences of Indigenous and non-

Indigenous offenders. More specifically, court data from Queensland, New South Wales, South Australia, and Western Australia suggests that Indigenous offenders may be sentenced more harshly than non-Indigenous defendants. However, court statistics only provide "baseline" differences between the sentences of Indigenous and non-Indigenous offenders; that is differences before taking into account other legally relevant factors (e.g. crime seriousness, criminal history) that may mitigate or aggravate sentences imposed by the courts.

Three key hypotheses for explaining baseline differences in sentencing by Indigenous status are identified in Chapter 1:

1. Differential involvement – sentencing disparity is a function of differences in the offending behaviours and histories of Indigenous versus non-Indigenous offenders.

2. Negative discrimination – disparity disadvantaging Indigenous defendants is a consequence of unintentional and unconscious perceptions of racial threat. Sentencing decisions are guided by particular focal concerns (blameworthiness and harm caused, community protection, practical constraints). Judicial perceptions and assessments of blame, risk and threat could be influenced by stereotypical attributions based on offender characteristics like minority group status especially when sentencing under constrained conditions (i.e. limited time and information).

3. Positive discrimination - disparity in sentencing could favour Indigenous offenders. This results from a level of judicial awareness around historical circumstance (i.e. colonisation) and pre-existing disadvantaged position of Indigenous people, and the potential for courts to further perpetuate these disparities if judicial power is used ineffectually. Furthermore, judges may be influenced by political and community expectations post-Royal Commission and the potential role of sentencing in reducing Indigenous over-representation.

Under the negative and positive discrimination hypotheses, the impact of Indigenous status on sentencing could be direct or interactional. A direct effect would mean that Indigenous offenders are either sentenced more or less harshly than non-Indigenous defendants, and that these differences cannot be attributed to differences in other key sentencing factors (e.g. offence seriousness, criminal history). Indigenous status may also interact with other factors to influence the sentencing decision either positively or negatively. An interactional effect means that different sentencing determinants are weighted differently by Indigenous status. For example, having a serious criminal history might increase or decrease sentence severity more

significantly for Indigenous offenders than for non-Indigenous defendants.

Given the complexity of the sentencing process, researchers agree that to investigate the impacts of characteristics such as Indigenous status on sentencing requires disentangling the effects of a wide range of potential sentencing determinates (such as offence seriousness, past criminal history). This is achieved through the use of multivariate statistical techniques, such as regression analysis, to estimate the separate independent (direct) impact of variables, controlling for other variables of interest, as well as interaction effects (Von Hirsch and Roberts, 1997: 228).

Prior Australian research that has employed these multivariate techniques to study the relationship between Indigenous status and sentencing provides support for the differential involvement, negative and positive discrimination hypotheses. In some instances, baseline differences in sentencing between Indigenous and non-Indigenous offenders disappear after controlling for other relevant sentencing factors such as current and past offending behaviours. Nonetheless, findings have also shown that Indigenous status continues to matter in sentencing (either directly or in interaction with other sentencing factors), sometimes but not always, to the disadvantage of Indigenous offenders (see Gallagher and Poletti, 1998; Barrett, 2006; Snowball and Weatherburn, 2006; Snowball and Weatherburn, 2007; Bond and Jeffries, 2010; Jeffries and Bond, 2010).

Statistical multivariate analyses of sentencing data (derived from administrative data and judicial sentencing remarks*)* in Queensland are reported in Chapters 2 and 3. Overall, results suggested that there are <u>few significant direct differences</u> in sentencing outcomes between Indigenous and non-Indigenous offenders in the higher courts (youth and adults) and the lower courts (adults only). Most baseline differences in sentencing outcomes for Indigenous and non-Indigenous offenders dissipated when demographic, social, case and processing factors were statistically controlled. This outcome <u>provides some support for the differential involvement hypothesis</u>.

However, some differences remained:

- Indigenous adults are less likely to receive other penalty orders (bonds without supervision and community service orders) in the adult higher courts,
- Indigenous children being dealt with in the higher courts (i.e. Childrens Court of Queensland (District Court), Supreme Court) are more likely to receive a suspended sentence of detention,
- Indigenous adults are more likely to receive a sentence of imprisonment, and more likely to receive a monetary order, but

less likely to have an order of disqualification of a driver's licence in the Magistrates Court.

Furthermore in terms of length/penalty amount adult Indigenous defendants receive:

- lower amounts for monetary orders in the adult Magistrates Court,
- shorter terms of actual and suspended sentences of imprisonment in the adult higher courts.

With regard to interactional effects (i.e. whether different sentencing determinants are weighted differently by Indigenous status), few significant differences were found, regardless of court type. Where found, these differential weightings by Indigenous status were primarily around legal factors in the adult Magistrates Court.

The higher likelihood of Indigenous offenders receiving a sentence of imprisonment in the adult Magistrates Court is the only result suggestive of negative discrimination. On the other hand, the finding that Indigenous defendants in some instances receive lenient sentence length/penalty amounts compared with non-Indigenous defendants could be construed as evidence of positive discrimination. Further, it is more difficult to conclude positive or negative discrimination by Indigenous status for other sentencing outcomes. For instance, Indigenous youth are more likely to receive a suspended sentence of detention. Although a suspended sentence could be viewed as harsh by virtue of the fact that any breach could trigger detention, it does not have the intensive reporting requirements of other orders (e.g. supervised bonds). For offenders, suspended sentences of detention could therefore be construed as less restrictive (i.e. less of a punishment) than other non-custodial sentences with onerous reporting requirements.

There are strong caveats around the above findings. In the Magistrates Court, important information about the context of the commission of the offences (e.g. presence of co-offenders, evidence of premeditation), other mitigating and aggravating circumstances (e.g. substance abuse, health, familial circumstances, employment status, past experiences of victimisation) could not be included in the statistical analyses. Further, in the higher courts (adult and children being dealt with in these courts) where information was collected on a range of offence, mitigating and aggravating factors, these measures were often limited and incomplete. As a result, any reported differences between Indigenous and non-Indigenous defendants sentencing outcomes may by explained by unmeasured or more precise measures of legal and social factors.

Results of the surveys of magistrates, judges and police prosecutors are reported in Chapter 4. Results suggest that:

- there may be some differences in the type of aggravating and mitigating factors presented in Indigenous cases compared to non-Indigenous defendants (i.e. alcohol and/or substance abuse, family dysfunction and/or disadvantage and low socio-economic status),
- issues such as a lack of community-based sentencing alternatives, appropriate treatment and/or rehabilitation programs and verifiable information about defendants hamper sentencing decision making,
- there was strong support for extending the Murri Court, Drug Court and Queensland's Indigenous Alcohol Diversion Program, due to their positive outcomes for Indigenous defendants,
- other community-based sentencing and bail options should be developed for Indigenous defendants,
- more court interpreters, Indigenous court liaison officers, and better resourced Indigenous legal services are needed.

Qualitative interviews and focus groups with Indigenous community justice groups yielded results similar to those found in the survey of magistrates, judges and police prosecutors (see Chapter 5). Overall, sentencing disparity was not perceived as a problem for the community justice groups that responded. However, a number of issues were identified as being problematic for Indigenous people at sentencing including:

- a lack of community based sentencing alternatives, diversionary and rehabilitation programs,
- barriers in language, communication and understanding,
- lack of consideration of traditional law and culture in more urban areas,
- accumulation of extensive criminal histories by Indigenous people for minor offences because of police overcharging.

Queensland's Indigenous Alcohol Diversion Program, JP Magistrates Court and community justice groups were viewed as positive for Indigenous offenders. It was further suggested that:

- more community based sentencing alternatives, diversionary and rehabilitation programs (e.g. half-way houses, outstations, drug and alcohol programs) should be established,
- Queensland's Indigenous Alcohol Diversion Program, JP Magistrates Court and community justice groups themselves should continue to be supported, resourced and possibly extended,
- magistrates receive training regarding Indigenous issues such as barriers to language, understanding, communication and culture.

Based on the evidence provided by the statistical analyses, consultations with key stakeholders, Indigenous sentencing disparities at least suggestive of negative discrimination are not widespread. However, the fact that some evidence of difference (even within the limitations of our data) was found indicates that sentencing needs to remain a focus of Indigenous criminal justice policy. Indeed, the problems encountered in accessing data mean that Indigenous status may be impacting sentencing in unidentified ways.

Nine recommendations were identified (see Chapter 6). These recommendations address four broad issues.

First, there is a need to enhance the use of existing data. This project highlights the importance of accessible and useable data on offenders and their cases. Evidence-based policy and programs require good and accessible data. This project was plagued by data access and quality issues which limited the ability to draw strong conclusions with regard to Indigenous sentencing disparity, and thus, identify more specific policy based-recommendations. Many of the difficulties in accessing data were due to the lack of a unique offender identifier across databases. Further while the Department of Justice and Attorney-General maintains extensive databases on offenders' cases and their outcomes, its utility for guiding policy and programs is limited because the databases were not designed to capture the key critical factors on offenders' cases. It is therefore recommended that:

1. *The Queensland Government should prioritise and facilitate the development of an integrated criminal justice database, which should include at a minimum an offender-level unique identifier.*

2. *Key factors influencing sentencing outcomes, such as prior criminal history, remand history, and use of alternative programs, need to be easily extracted from administrative databases.*

Second, improving the monitoring of, and extending research on, sentencing disparities is an important strategy for ensuring and maintaining just outcomes for Indigenous offenders. In light of the finding that there may be some negative disparity occurring in the Magistrates Court and the difficulties of obtaining information about particular factors in all courts, there is a role for further research to improve our understanding of the relationship between Indigenous status and sentencing outcomes. Moreover, as highlighted by the consultations with key stakeholders, the impact of regional variation in delivery of sentencing alternatives needs to be explored. Thus, it is recommended that:

3. *Regular monitoring of trends and variations in sentencing outcomes for Indigenous and non-Indigenous offenders should be conducted.*

4. *Examining questions of regional variation in sentencing outcomes for Indigenous and non-Indigenous offenders should be a future research priority.*

Research on Indigenous defendants' experiences of the sentencing process, and what they perceive as their needs and difficulties, is absent from the evidence-base for policy and program development. This research dimension was outside the scope of the current project, and has been largely ignored in local research. However, international research shows that if groups feel they have been treated unfairly by the courts, their confidence in the criminal justice system may be seriously impaired and their commitment to it weakened (Shute, Hood and Seemungal, 2005) This type of research would also provide valuable empirical evidence of the types of programs and interventions that, from the point of view of Indigenous offenders, might better address their needs.

5. *Examining Indigenous offenders' experiences of the sentencing process should be a future research priority*.

Third, Indigenous-specific programs that address the needs and barriers experienced by Indigenous offenders (including the ability to access rehabilitative community-based sentencing alternatives) appear to play an important role in the sentencing process. Stakeholder consultations showed strong support for court programs and sentencing options that they believed addressed barriers experienced by Indigenous offenders and assisted in the provision of information relevant to the sentencing process. It is subsequently recommended that:

6. *Further resources should be provided to existing programs that address the barriers experienced by Indigenous offenders in the court process itself (e.g. court interpreters, Murri Court, JP Magistrates Court, community justice groups). Before doing this the results of current program reviews should be considered.*

The statistical analyses conducted for this project suggested that a substantial part of the initial differences in sentencing outcomes between Indigenous and non-Indigenous offenders was due to higher current offence seriousness, more extensive criminal histories, and differences in social histories. These findings, combined with key stakeholders' perceptions of the key differences in circumstances of Indigenous and non-Indigenous cases, points to the need for criminal justice interventions and programs that target these differential risks. Consultations with key stakeholders provided some suggestions about the nature of these programs, such as the Indigenous Alcohol Diversion Program, Indigenous specific custodial facilities, bail,

probation and community service programs. It is therefore recommended that:

7. *More programs targeted at the unique needs of Indigenous offenders should be developed in consultation with Indigenous communities.*

However, a key issue raised in the survey of judges and magistrates and consultations with community justice groups was that there may be a lack of access to community-based sanctions with a rehabilitative component in certain locations, due to difficulties in providing viable supervisory arrangements as well as limited available rehabilitative facilities (e.g. substance abuse programs). Thus, it is recommended that:

8. *Strategies to improve access to viable community-based orders with a rehabilitative component should be developed. These strategies should be developed in consultation with Indigenous communities.*

Fourth, community justice group consultations indicated that cultural and language barriers continue to disadvantage Indigenous defendants. There was great concern about the fact that interpreters were not being used as a matter of course. It was suggested that this may be due to judicial officers finding it difficult to ascertain when a court interpreter was needed. 'Breaking down' language barriers is critical for ensuring that appropriate information is provided to judicial officers and the court system remains fair. Thus, we recommend that the relevant departments consider a review of current training programs around Indigenous language and culture, especially looking at the modes of training delivery given the workload commitments of judicial officers and prosecutors. For example, a recent review of training with regard to the use of Aboriginal English in the court recommended that better educational outcomes might be achieved via the use of video and/or online training (Lauchs, 2010).

9. *Existing training for judicial officers and prosecutors on cross-cultural awareness particularly language barriers should be reviewed and where necessary more appropriate training techniques should be implemented.*

Chapter 1: Understanding the Impact of Indigenous Status on Sentencing

Understanding the processes by which Indigenous people are sentenced and why they appear to be sentenced more harshly than their non-Indigenous counterparts is crucial, given that Australian governments are seeking to reduce Indigenous over-representation in our prisons (Jeffries and Bond, 2009). This report presents research findings from *The Sentencing Disparities Project*, an initiative of the Queensland Government's *Indigenous Criminal Justice Research Agenda*. The purpose of this project was to provide a detailed examination of sentencing disparities between Indigenous and non-Indigenous defendants before Queensland Courts.

The report is comprised of six chapters. Chapter 1 provides a detailed introduction to the current research and the issue of Indigenous sentencing disparities. Chapters 2 and 3 present results from statistical analyses of Indigenous status and sentencing in a range of Queensland courts. Chapters 4 and 5 describe the principal research findings from consultations undertaken with key stakeholders in the criminal justice system including: judges, magistrates, police prosecutors and community justice groups. A discussion and conclusion section with recommendations for further research and reform appear in Chapter 6.

The current chapter provides a background to the research by considering:

- the issue of Indigenous over-representation in prison,
- research questions and specifications of the *Sentencing Disparities Project,*
- current Australian court sentencing data by Indigenous status,
- key theoretical arguments that have been provided in international research on sentencing disparities,
- key empirical findings of international research on differential sentencing for African American, Latino/a and Indigenous people,
- findings from the few available Australian sentencing studies on Indigenous sentencing disparity.

BACKGROUND – INDIGENOUS OVER-REPRESENTATION IN PRISON

The final report of *The Royal Commission into Aboriginal Deaths in Custody* (1991) was released just over 15 years ago. Established to investigate growing public concern about the deaths of Indigenous Australians in custody, the Royal Commission made a two-fold conclusion. Although Indigenous persons in custody do not die at a

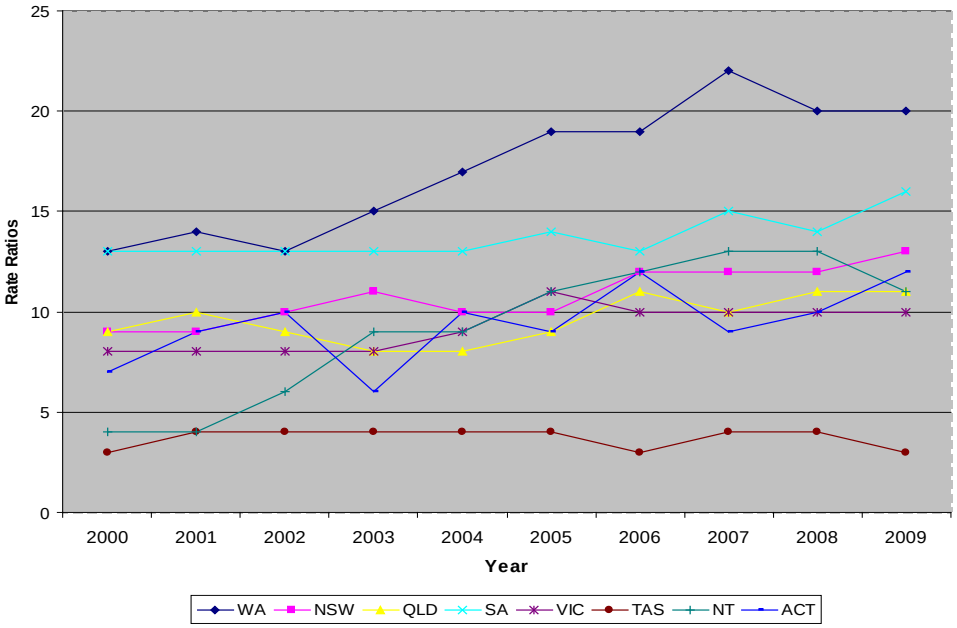
greater rate than non-Indigenous persons, they are overwhelmingly more likely to be in custody than others (The Royal Commission into Aboriginal Deaths in Custody, 1991). Thus, an important part of the Royal Commission's 339 recommendations for reform was changes in the operation of the criminal justice system to reduce levels of Indigenous over-representation.

Nonetheless, Indigenous adult imprisonment rates have risen since the Royal Commission, and more significantly, the gap between the proportions of Indigenous Australians to non-Indigenous persons in adult prisons has widened. In 1992, Indigenous prisoners comprised 14% of the total Australian adult prison population. As at June 30 2009, this proportion had increased to 25%, even though Indigenous Australians comprise only around 2.5% of the total Australian population (Australian Bureau of Statistics, 2006: 4; Australian Bureau of Statistics, 2009: 31). The age standardised rate of imprisonment for Indigenous prisoners in 2009 was 1,891 per 100,000 adult Indigenous population, compared with a rate of less than 1,200 per 100,000 in 1992 (Australian Bureau of Statistics, 2009: 33; Australia Institute of Criminology, 2007: 88).

Indigenous incarceration rates are generally increasing in all jurisdictions but there is significant jurisdictional variance. Western Australia and New South Wales have consistently had the highest rates of Indigenous imprisonment. Until 2007, Queensland ranked third but now has been surpassed by both South Australia and the Northern Territory. Victoria, the ACT and Tasmania have, in contrast to the other jurisdictions, fairly low Indigenous incarceration rates (Australian Bureau of Statistics, 2009).

As incarceration rates overall may have also increased, changes in rate ratios (Indigenous rates compared to non-Indigenous rates) provide a useful picture of the gap between Indigenous and non-Indigenous offenders over time across the different Australian jurisdictions. Figure 1.1 (below) shows the jurisdictional rate ratios for adult offenders from 2000 to 2009. For most jurisdictions, the gap between Indigenous and non-Indigenous imprisonment rates has increased between 2000 and 2009. In this period, Western Australia had the largest gap. In 2009 alone, Indigenous offenders in this jurisdiction were 20 times more likely to be incarcerated than non-Indigenous offenders. In contrast, Tasmania has consistently had the lowest rate ratios for this period, with Indigenous offenders being 3 times more likely to be incarcerated in 2009. In this period, the rate ratios for Queensland ranged between 9 and 11.

Figure 1.1. Ratio of Indigenous to Non-Indigenous Adult Imprisonment Rates by Jurisdiction (2000-2009)



Source: Australian Bureau of Statistics (2009: 54).
Note: Based on age standardised rates.

In contrast to adults, Indigenous juvenile detention (aged 10-17 years) rates were declining in Australia since the Royal Commission until 2007. This initial decline may in part be due to a paradigm shift in Australian youth justice policy from detention to diversion, which has seen incarceration being used only as a last resort. The outcome may be reflected in a substantial decline in the rate of young people detained. For example, between 1981 and 2007, there was 51% decrease in rates (65 compared with 33 per 100,000). Similarly, the rate of Indigenous young people detained has also reduced. For example, between 1994 and 2002, the Indigenous youth detention rate decreased by 32%, and was stable between 2003 and 2006 (Taylor, 2009: 18-34). However, 2007 saw an increase in rates of Indigenous youth detention.

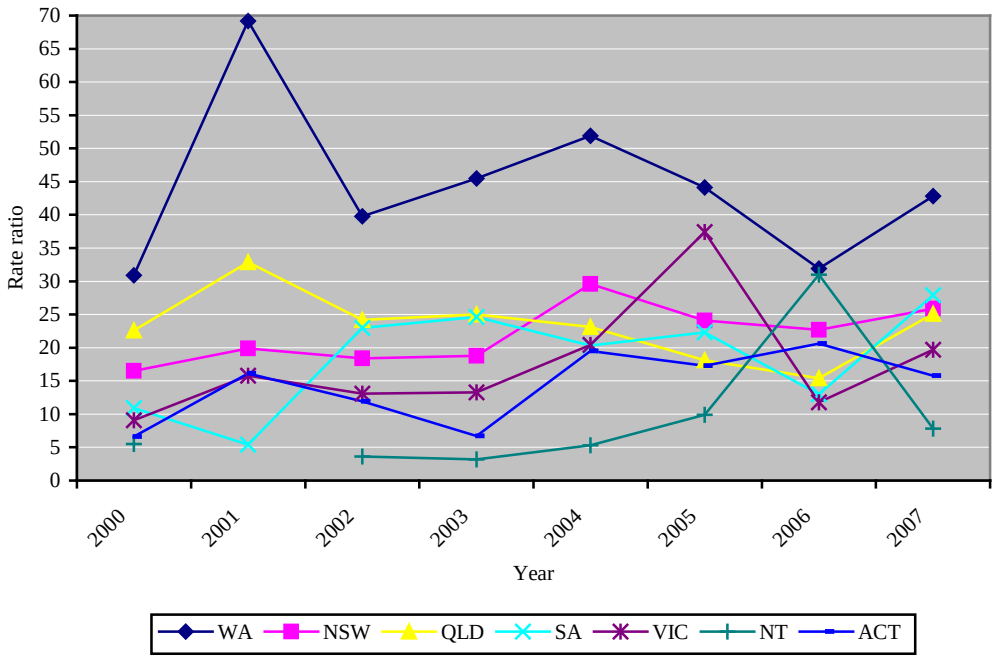
Nonetheless, Indigenous over-representation in youth detention centres remains high. In 1994, Indigenous young people were detained at rates 17 times that of non-Indigenous youth (414 compared with 24 per 100,000). By 2007, Indigenous youth detention rates were just under 28 times higher than non-Indigenous youth (403 compared with 14.4 per 100,000) (Taylor, 2009: 18-34).

There is also considerable jurisdictional variance in Indigenous youth detention rates. (Note that due to the relatively small number of youth in detention per year, small changes in the absolute numbers may result in large fluctuations.) For the period 2000 to 2007, Western Australian rates were particularly high, while in Victoria, they

were consistently low. For example, as at 30 June 2007, Western Australia's Indigenous youth detention rate was approximately 703 per 100,000, 43 times greater than for non-Indigenous young people. In contrast, the Indigenous youth detention rate in Victoria at this time was only 142 per 100,000, 20 times the non-Indigenous rate (Taylor, 2009: 18-34). Rates of Indigenous youth incarceration in 2007 increased for Victoria, Queensland, South Australia, Western Australia, and the Northern Territory.

Figure 1.2 (below) presents the jurisdictional ratios of Indigenous to non-Indigenous youth detention rates for 2000 to 2007. These data show that although Indigenous young offenders are more likely to be detained, between 2003 and 2006, this gap appeared to be decreasing in most jurisdictions, including Queensland. However, the most recent rate ratios show an increase in over-representation of Indigenous youth in detention for most states. Indigenous youth remain grossly over-represented in juvenile detention.

Figure 1.2 Ratio of Indigenous to Non-Indigenous Youth Detention Rates by Jurisdiction (2000-2007)



Source: Taylor (2009: 30).
Notes: Based on age standardised rates. Data was not available for Northern Territory in 2001. Tasmania was excluded due to missing data.

Queensland's response to Indigenous over-representation in prison

In Queensland, on the 19th of December 2000, the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* (Justice Agreement) was signed. The aim of the Justice Agreement is to reduce the rate of Aboriginal and Torres Strait Islander people coming into contact with the Queensland criminal justice system to, at least, the

same rate as non-Indigenous Queenslanders. The Justice Agreement seeks to achieve a 50% reduction in the rate of Aboriginal and Torres Strait Islander people incarcerated in the Queensland criminal justice system by the year 2011. However, as the above data suggests, Indigenous rates of incarceration have not decreased.

The first independent evaluation of the Justice Agreement was commissioned from Professor Chris Cunneen in March 2005. The evaluation examined the following issues:

- achievements over the period 2001-2004,
- the relative impact of the Government's actions and other factors,
- government actions that have had the most effect,
- additional, alternative or existing strategies that will aid in achieving the desired outcomes.

The Evaluation Report contained 15 recommendations together with a number of findings dispersed throughout the body of the report. Recommendation 7 in Professor Cunneen's evaluation proposed the development of an Indigenous Criminal Justice Research Agenda to address the deficit in our understanding of key factors associated with Indigenous offending and victimisation and how the system can effectively respond to these issues, and to drive policy initiatives.

The concept of the *Indigenous Criminal Justice Research Agenda*, as proposed by Professor Cunneen, was expanded to provide a mechanism to set the strategic direction to the Queensland Government concerning research into crime and criminal justice research relevant to Indigenous people and communities. The Indigenous Criminal Justice Research Agenda aims to:

- provide strategic direction for Indigenous criminal justice research so that Government research is focused on key issues,
- expand Queensland-specific knowledge of Indigenous crime, victimisation and justice,
- provide a sound platform upon which to develop Indigenous justice policy,
- ensure high quality, reliable research is being conducted in government agencies,
- reaffirm the Government's commitment to the Justice Agreement and to working in partnership with Indigenous people to reduce Indigenous incarceration rates.

PROJECT OVERVIEW

One of the research priorities highlighted through the *Indigenous Criminal Justice Research Agenda* was an examination of sentencing disparities between Indigenous and non-Indigenous defendants before

Queensland Courts - *The Sentencing Disparities Project*. The following project questions were specified:

- Do sentencing outcomes for Indigenous youth and adult offenders differ from those for non-Indigenous youth and adult offenders?

- Is sentencing disparity evident across the spectrum of sentencing outcomes?

- What individual (e.g., offending history, child protection history, educational attainment, employment, drug use, etc.), social (e.g., family support, other), court process (e.g., legal representation, court interpreters, Indigenous sentencing initiatives such as Murri Courts and the involvement of elders and community justice groups) and correctional (e.g., available sentencing options, length of time served on remand) factors influence sentencing outcomes, and do these factors differ for Indigenous and non-Indigenous offenders?

- Are there different views about what constitutes aggravating and mitigating factors in sentencing Indigenous offenders?

Project components specified include:

- a literature review exploring sentencing disparities and more, specific links between Indigenous status and sentencing,
- statistical analyses of existing data pertinent to sentencing,
- interviews, focus groups and surveys with key stakeholders from government and non-government agencies involved in the sentencing process,
- the presentation of several policy and program options aimed to reduce Indigenous sentencing disparities.

DOES BASELINE COURT DATA SHOW DISPARITY IN THE SENTENCING OF INDIGENOUS VERSUS NON-INDIGENOUS OFFENDERS?

Existing court data suggest that Indigenous offenders experience different case outcomes than their non-Indigenous offenders. In particular, these data show that Indigenous offenders are often sentenced more harshly than others. However, court statistics only provide "baseline" differences between the sentences of Indigenous and non-Indigenous offenders; that is differences before taking into account other legally relevant factors (e.g. crime seriousness, criminal history) that may mitigate or aggravate sentences imposed by the courts.

As there is limited current information on sentencing outcomes by Indigenous status across Australian jurisdictions, we rely primarily on

data from Queensland (lower and Childrens Courts), and three other Australian jurisdictions, namely, New South Wales (lower and higher courts), South Australia (lower and higher courts), and Western Australia (lower, higher and Childrens Courts). As data was available for different years across jurisdictions, comparative conclusions must be tentative.

Queensland

Sentencing outcomes for adult criminal defendants in Queensland's lower courts by Indigenous status for the year 2004 are presented in Table 1.1. This table shows that, compared with non-Indigenous adults, Indigenous adult defendants received significantly more custodial orders (Cunneen, Collins and Ralph, 2005: 56).

Table 1.1. Lower Court Sentencing Outcomes by Indigenous Status, Queensland 2004

	Indigenous (%)	**Non-Indigenous** (%)
Custodial Order	11	4
Community Supervision	7	5
Monetary Order	77	86
Non-Custodial Order	6	5
Total	100	100

Source: Adapted from Cunneen et al. (2005: 56).

An examination of custodial orders by offence category and Indigenous status indicates that in all but one offence category (deception and related offences), Indigenous adults were more likely than non-Indigenous adults to receive a custodial order (see Table 1.2 below) (Cunneen et al., 2005: 57).

Finally, when sentence length/penalty amount was decided in the lower courts, non-Indigenous Queenslanders received harsher outcomes than their non-Indigenous counterparts such as longer terms of imprisonment, probation and community service (Cunneen et al., 2005: 56-59).

Table 1.2. Lower Court Custodial Orders by Offence Category and Indigenous Status, Queensland 2004

	Indigenous (%)	Non-Indigenous (%)
Acts intended to cause injury	26	9
Sexual assault and related offences	40	23
Dangerous or negligent acts	10	4
Abductions and related offences	50	17
Unlawful entry with intent	31	26
Theft and related offences	11	6
Deception and related offences	3	7
Illicit drug offences	4	3
Weapons and explosive offences	5	1
Property damage and environmental pollution	12	4
Public order offences	3	1
Traffic offences	8	3
Justice and government offences	16	7
Miscellaneous offences	4	2
Total	100	100

Source: Adapted from Cunneen et al. (2005: 57).

Similarly, young Indigenous Queenslanders sentenced in 2004 also received outcomes at the "harsher end of the sentencing scale including proportionately more custodial orders and supervisory orders" (see Table 1.3; Cunneen et al., 2005: 53). Cunneen and colleagues (2005: 53) reported that this disparity exists across all offence categories. They also found that Indigenous youth were sentenced to longer periods of probation than non-Indigenous youth. For instance, Indigenous youth were more likely to receive probation orders of 12-24 months (36% compared with 27% of non-Indigenous youth). No significant differences by Indigenous status were found in sentence length for custodial terms or community service orders (Cunneen et al., 2005: 54).

Table 1.3. Sentencing Outcomes by Indigenous Status, Childrens Courts[1] Queensland 2004

	Indigenous (%)	Non-Indigenous (%)
Custodial Order	3	1
Community Supervision	38	27
Monetary Order	5	11
Noncustodial Order	54	61
Total	100	100

Source: Adapted from Cunneen et al. (2005: 52).

[1] Cuneen et al. (2005) do not distinguish in their report between the lower and higher appearances in the Childrens Court. In Queensland, the Childrens Court deals with all youth who commit criminal offences under the age of 17 years, unless the court orders that the matter be dealt with in an adult court. Thus, the Childrens Court exercises a wide jurisdiction and can be convened by a Magistrate or a District Court judge (ss. 5 & 6 *Childrens Court Act 1992*).

Other Australian jurisdictions: New South Wales, South Australia, and Western Australia

Despite some differences in sentencing laws, base-line differences in sentencing outcomes by Indigenous status have been shown in other Australian jurisdictions. For instance, in other states, differential outcomes (as shown above for Queensland) in the adult courts have been documented, although for different years. In New South Wales, Baker (2001: 5-6) reported that in 1999, Indigenous offenders were more likely than non-Indigenous offenders to be sentenced to prison both in the lower (17% compared with 15%) and higher courts (76% compared with 68%). In South Australia, Castle and Barnett (2000: 21-42) reported that sentences of imprisonment were issued in 11% of Indigenous cases and 5% of non-Indigenous cases before the lower courts during 1998. In the South Australian higher courts that same year, 53% of Indigenous offenders received a prison sentence compared to 43% of non-Indigenous offenders. Similarly, in Western Australia, Loh and Ferrante (2003: 20-24) found that Indigenous defendants (66% in higher courts and 13% in the lower courts) were more likely than their non-Indigenous counterparts (60% and 8% respectively) to receive sentences of imprisonment based on data for 2001.

In all three jurisdictions, like Queensland, there may be differences by Indigenous status across offences categories (see Baker, 2001: 3 for New South Wales; Castle and Barnett, 2000: 21-26 for South Australia; Loh and Ferrante, 2003: 21, 24 for Western Australia). Most notably, the proportion of Indigenous offenders receiving a custodial order was significantly larger than for non-Indigenous offenders for crimes against the person (New South Wales, South Australia, Western Australia), theft (New South Wales, South Australia, Western Australia), traffic offences (South Australia, Western Australia), justice offences (New South Wales) and crimes against the good order (South Australia).

However, in terms of the length of sentencing orders, not all jurisdictions showed evidence of harsher outcomes for Indigenous defendants (as the data suggests in Queensland). (These patterns may be different if data were available for the same year in each jurisdiction.) Based on the data available, imprisonment terms for Indigenous criminal defendants were more likely to be shorter than those for non-Indigenous persons in both New South Wales and South Australia. In the lower courts of New South Wales, 38% of Indigenous offenders were sentenced to imprisonment of six months or longer compared with 43% of non-Indigenous offenders (Baker, 2001). In the New South Wales higher courts, the difference was marginal, although in the same direction (94 and 95% respectively: Baker, 2001). While average prison terms in South Australia were 25 weeks (lower courts) and 36 months (higher courts) for Indigenous offenders compared to

20 weeks (lower courts) and 50 months (higher courts) for non-Indigenous offenders (Castle and Barnett, 2000).

Table 1.4 shows average length of imprisonment for the lower courts of South Australia by offence category and Indigenous status.[2] These data showed that Indigenous defendants received shorter periods in prison for all offence categories apart from good order offences where terms were equal with non-Indigenous persons.

Table 1.4. Mean Length (weeks) of Imprisonment Term Imposed in South Australia's Lower Courts by Offence Category and Indigenous Status, 1998

Offence Category	Indigenous (mean in weeks)	Non-Indigenous (mean in weeks)
Against the Person	18	26
Larceny and Receiving	19	26
Good Order	9	9
Driving	6	8

Source: Castle and Barnett (2000: 21-26).

The pattern is mixed for Western Australia. Loh and Ferrante (2003: 21-24) found that although the median imprisonment terms differed by Indigenous status, the *direction* of this difference varied by offence category (see Table 1.5). In the higher courts, Indigenous offenders received *longer* terms for sex offences, motor vehicle theft and fraud offences, *shorter* sentences for homicide, robbery and burglary, and *equivalent* sentence lengths for assault and other theft. In the lower courts, Indigenous people received slightly longer imprisonment terms for crimes against the person and driving offences. In contrast, non-Indigenous people received longer periods for property crime and other offences. Median sentence length by Indigenous status was the same for offences against the good order.

[2] These data were not available for the higher Courts of South Australia, or the courts of New South Wales.

Table 1.5. Median Length (months) of Imprisonment Terms Imposed in Western Australia's Higher and Lower Courts by Offence (Group) and Indigenous Status, 2001

Higher Courts	Indigenous (median in months)	Non-Indigenous (median in months)	Lower Courts	Indigenous (median in months)	Non-Indigenous (median in months)
Homicide	75	174	Against the person	6	4
Assault	18	18	Against property	4	6
Sex offences	32	24	Good order	3	3
Robbery	36	60	Driving/vehicle	6	5
Burglary	12	18	Other	1	3
Fraud	48	18	Unknown	2	6
Motor vehicle theft	24	15	Total offences	4	4
Other theft	12	12			
Other offences	12	18			
Total offences	18	21			

Source: Loh and Ferrante (2003: 21 and 24).

Disparities in youth sentencing by Indigenous status are also evident in Western Australia. Loh and Ferrante (2003: 25) reported that while the most common penalties imposed by the Childrens Court are noncustodial orders (around 75% in 2001), Indigenous youth convicted of an offence were more likely than non-Indigenous youth to receive a custodial sentence: 25% compared with 16%.

HOW MIGHT DISPARITY IN THE BASELINE SENTENCING DATA BE EXPLAINED?

Australian court data suggest that there are initial baseline differences in the sentences of Indigenous offenders and non-Indigenous offenders. Three key hypotheses to explain these apparent differences can be identified from prior research on racial/ethnic/Indigenous disparities in sentencing. These are:

1. differential involvement,
2. negative discrimination,
3. positive discrimination.

Differential involvement hypothesis

Existing differences in legally relevant factors between Indigenous and non-Indigenous offenders may mediate the relationship between Indigenous status and sentence outcomes (Weatherburn, Fitzgerald and Hua, 2003: 1). For example, disparate sentencing decisions may simply be a response to differences in the offending behaviours of Indigenous and non-Indigenous offenders. In other words, the relationship between minority group status and sentencing may be indirect because it is acting through other legal variables differentiated by race/ethnicity/Indigenous status (Sampson and Lauritsen, 1997: 347). Thus, there is no racial/ethnic/Indigenous discrimination in sentencing because it plays little or no independent (direct) role, once other legally relevant sentencing factors are

controlled (see for example Hagan, 1975; Pennington and Lloyd-Bostock, 1987; Albonetti, 1991; Bickle and Peterson, 1991; Rattner, 1996; Jeffries, Fletcher and Newbold, 2003; Weidner, Frase and Pardoe, 2004; Weidner, Frase and Schultz, 2005).

Negative discrimination hypothesis

Others argue that, on average, an offender's race/ethnicity/Indigenous status does have an effect on their sentence, resulting in harsher outcomes. This argument relies on the concept of "threat" to explain more severe outcomes for minority group offenders. Originally, researchers drew on the conflict school of criminological thought, arguing that discrimination in sentencing should be expected because minority groups are seen as constituting the greatest "threat" to the dominant power group, and thus, the law will be more rigorously applied to them (Peterson and Hagan, 1984; Vold, Bernard and Snipes, 2002).

More recently, studies on sentencing disparity have focused on the theoretical frameworks of "focal concerns" and attributions. Sentencing research suggests that sentencing decisions are guided by a number of focal concerns, particularly offender blameworthiness and harm caused by the offence, community protection, and practical constraints presented by individual offenders, organisational resources, political and community expectations (Steffensmeier, Ulmer and Kramer, 1998: 766-767; Johnson, 2006). Offender characteristics, such as race/ethnicity/Indigenous status, may increase judicial assessments of blameworthiness or culpability, as well as judicial perceptions of increased future risk to the community. Organisational constraints may create or amplify such perceptions by pressuring judges to make decisions with limited information and time, leading to judicial reliance on 'perceptual shorthand' to determine sentences. This could potentially result in stereotypical attributions of increased threat and criminality being made toward minority group offenders (Steffensmeier, Ulmer and Kramer, 1998: 768; Ulmer and Johnson, 2004: 144-145; Mackenzie, 2005: 28; Johnson, 2006: 267).

Under the negative discrimination hypothesis, the impact of minority group statuses may be direct or interactive. A *direct* effect means that minority group offenders are sentenced more harshly than non-minority offenders, and that these differences cannot be attributed to differences in crime seriousness, prior criminal record, or other legally relevant factors (Pratt, 1998).The minority statuses of offenders may also *interact* with other factors to influence the sentencing decision (Sampson and Lauritsen, 1997: 347). In other words, different sentencing determinates may be weighted differently by race/ethnicity/Indigenous status. For example, variables such as being remanded into custody, pleading not guilty, having a serious

criminal history, and being younger, male and unemployed might increase sentence severity more significantly for minorities (see review Miethe and Moore, 1986; Spohn, 2000: 462-463). This suggests that certain types of minority group offenders are singled out for harsher treatment, that they are somehow perceived to be more problematic than 'whites' in similar circumstances.

Positive discrimination hypothesis

The positive discrimination thesis suggests that minority group statuses mitigate sentencing outcomes. There are at least two reasons, flowing from the focal concerns perspective, for expecting more favourable sentencing outcomes for minority group offenders.

First, sentencing outcomes are known to be affected by offender constraints, such as the ability to 'do time' (Steffensmeier, Ulmer and Kramer, 1998: 767-768; Johnson, 2003: 454-455). In comparison to the non-minority population, minorities tend to experience higher levels of social and economic disadvantage and associated poverty, victimisation, substance abuse and ill health. This situation often resonates from historical contexts (e.g. colonisation). Potentially therefore, racial/ethnic/Indigenous differences in offender constraints could mitigate sentence severity and lead to more lenient outcomes for minority group offenders. For example, higher levels of poor health amongst ethnic minorities could result in less severe sentencing outcomes because compared to non-minority offenders, they are perceptually less blameworthy. In other words, the relationship between minority group statuses and sentencing may be indirect because it is acting through other social variables differentiated by race/ethnicity/Indigenous status.

There could also be positive direct effects between race/ethnicity/Indigenous status and sentencing. Minority group statuses may operate over and above traditional blameworthy measures (e.g. health, victimisation) to mitigated sentencing. Minority group offenders could be perceived as less blameworthy than their counterparts from majority groups because of the historical legacies associated with their social and economic marginalisation and the potential of imprisonment to further exacerbate this.

Historical legacies and current societal positioning could also result in different weightings being given to sentencing factors (interaction effects). In this scenario, when minority and majority group offenders appear before the court as equivalents, mitigating factors are given more weight and aggravating variables less weight for minority offenders. For example, in contrast to majority group offenders, those from minority groups may be held less responsible for their criminal histories and as a result, this factor could have a less substantial aggravating influence on sentencing (Jeffries and Bond, 2009).

Second, community and political constraints may influence judges to mitigate sentence severity for minority group offenders (Steffensmeier, Ulmer and Kramer, 1998: 767). For example, in Australia, the potential for Indigenous status to reduce sentence severity is theoretically strong. In response to the Royal Commission, State and Territory governments are publicly committed to reducing Indigenous over-representation. In addition, there is a certain level of community awareness and perhaps concern about the treatment of Indigenous people. These constraints may place pressure on judges to reduce sentence severity for Indigenous defendants either directly or through interaction with other sentencing factors (Jeffries and Bond, 2009).

WHAT HAS PRIOR SENTENCING DISPARITIES RESEARCH FOUND?

Research on sentencing disparities has been dominated by North American studies. Spanning more than 40 years, the majority of these studies have explored disparities between whites and African Americans, and more recently, between whites and Latinos (Spohn, 2000; Weinrath, 2007: 17). Moreover, North American researchers agree that to investigate the impacts of race (i.e. African American status) and ethnicity (i.e. Latin American status) on sentencing requires disentangling the effects of a wide range of potential sentencing determinates (such as offence seriousness, past criminal history). This is achieved through the use of multivariate statistical techniques, such as regression analysis, to estimate the separate independent (direct) impact of variables, controlling for other variables of interest, as well as interaction effects (Von Hirsch and Roberts, 1997: 228).

International research: sentencing African American and Latino offenders

The general conclusion of recent reviews of statistical sentencing disparity research is that there is empirical evidence of direct racial and ethnic disparity in sentencing outcomes, independent of crime seriousness or prior criminal record. In the most recent review, Mitchell (2005: 444) assessed 71 studies examining sentencing outcomes in adult courts, with controls for offence seriousness and criminal history. Taken as a whole, the studies indicated that even after adjusting for other factors such as offence seriousness and prior criminal history, "African-Americans were punished more harshly than whites" (Mitchell, 2005: 456).

> As a whole, these findings undermine the so-called "no discrimination thesis" [differential involvement perspective] which contends that once adequate controls for other factors, especially legal factors (i.e., criminal history and severity of current offense), are controlled unwarranted racial disparity disappears. In contrast to the no discrimination thesis, the current research [review] found that independent of other measured factors, on

> average African-Americans were sentenced more harshly than whites (Mitchell, 2005: 462)

However, the size of the race-sentencing effect depended on how criminal history and current crime seriousness were measured. Employing less precise measures of criminal history and offence seriousness produced larger estimates of direct racial disparity (Mitchell, 2005: 457).

Spohn's (2000: 428 and 453) review of 40 studies (which used appropriate multivariate techniques and included controls for current and past criminality) also supported the existence of direct racial, as well as ethnic, disparity in sentencing. This review came to three conclusions of interest about empirical research on sentencing disparity.

First, minority offenders were often more likely than their white counterparts to be sentenced to prison, even after taking into account other relevant sentencing factors (Spohn, 2000: 428). Few studies (less than 1% of the total 167 estimates of a race/ethnicity effect) indicated more lenient sentencing outcomes for minorities (Spohn, 2000: 455-456).

Second, the effect of race/ethnicity and sentence severity varied by sentencing stage. Racial/ethnic minority offenders were more likely to be disadvantaged at the initial decision to imprison or not (in/out sentencing stage) than at the subsequent decision concerning length of sentence. For example, over 50% of in/out sentencing estimates showed that racial/ethnic minority offenders were more likely to be imprisoned. In contrast, 30% of estimates for length of imprisonment term found race/ethnicity significantly increased sentence lengths (Spohn, 2000: 455-456).

Finally, there was "compelling evidence [across the studies] that offender race and ethnicity affect sentence severity…in interaction with other legal and extralegal variables" (Spohn, 2000: 475). Research shows that some sentencing determinants were weighted more negatively for racial/ethnic minority offenders than for whites. For example, being convicted of misdemeanour and/or drug offences, having a serious prior criminal record, victimising whites, refusing to plead guilty and/or being held in custody before trial had a greater negative effect for African American and Latino offenders than white offenders under the same circumstances (Spohn, 2000: 461, 464-465).

An examination of racial disparity in juvenile justice also shows that offender race/ethnicity may matter. Engen, Steen and Bridges (2002) evaluated the findings of 65 studies of race and juvenile justice decisions. There are two conclusions of particular interest. Their

analysis indicates that offence characteristics do not completely explain racial disparities in juvenile dispositions, but that prior criminal history does reduce the likelihood of finding a direct race effect (Engen, Steen and Bridges, 2002: 213). This suggests that prior criminality may mediate the relationship between race and dispositional outcomes, although this finding cannot adjudicate between differential involvement or differential treatment. The accumulation of a prior criminal history also means the accumulation of past decisions.

International research: sentencing Indigenous people in North America and Canada

Since the mid-1990s, only a handful of international researchers have examined the impact of Indigenous status on sentencing, taking into account other relevant sentencing determinates in their analyses. Many of these studies lack the methodological rigour evident in the African American/Latino/white sentencing research, with some failing to include measures of past and current crime seriousness.

As a body of research, these studies find some support for the differential involvement hypothesis, with the effect of Indigenous status on sentence severity being reduced after controlling for other important sentencing variables. Nonetheless, discrimination (positive and negative) has been found. For example, Alacerez and Bachman (1996), in an analysis of disparities in imprisonment terms received by Indigenous and white Americans, found that Indigenous offenders received similar sentences for sexual assault, assault and larceny, significantly longer sentences for robbery and burglary, and shorter sentences for homicide. The authors speculate that this pattern of results might be attributable to the race/ethnicity of the victims (Alacerez and Bachman, 1996: 556-559). Although Alacerez and Bachman did not have a measure of victim's race in their study, U.S. offence statistics show that the victims of violent crime committed by Indigenous Americans are also more likely to be Indigenous. Offending against Indigenous victims may be viewed as less threatening than offending against white victims (Alacerez and Bachman, 1996: 556-559).[3]

Mun and McMorris (2002) examined the relationship between Indigenous status and two sentencing outcomes (fines and imprisonment) in a sample of over 8,000 misdemeanours (summary offences) from three U.S. counties. Their analysis showed that although offence seriousness reduced the effect of Indigenous status on both sentencing outcomes, Indigenous American offenders received

[3] This interpretation is plausible given the findings from research on sentencing outcomes for African, Latino and white Americans which show ethnic minority offenders who victimise whites are treated more harshly than those who violate ethnic minority victims (Spohn, 2000).

significantly higher fines than white offenders, and were more likely to be sentenced to a jail terms (Alacerez and Bachman, 1996: 250-251).

However, the findings of the above two studies are limited due to a failure to include measures of factors known to have significant effects on sentencing decisions. In particular, Alacerez and Bachman (1996) used a rough measure of current offence seriousness (i.e. offence type), while Mun and McMorris omitted prior criminal history in their study. Less precise measures of offence seriousness and absence of a measure for criminal history result in the over-estimation of direct racial disparity (see for example Mitchell 2005). Further, the lack of a prior criminal history measure is especially concerning given the significant impact of past criminality on sentencing outcomes (Hagan, 1975; Pennington and Lloyd-Bostock, 1987; Albonetti, 1991; Bickle and Peterson, 1991; Hesketh and Young, 1994: 49-52; Ashworth, 1995: 131-164; Rattner, 1996; Jeffries, Fletcher and Newbold, 2003; Weidner, Frase and Pardoe, 2004; Weidner, Frase and Schultz, 2005; White and Perrone, 2005: 155).

Despite their limitations, the finding of a direct negative effect of Indigenous status on sentencing outcomes has been found in more rigorous studies. In their analysis of 59,250 offenders sentenced in the U.S. Federal Court, Everett and Wojkiewicz (2002: 207) found that Indigenous American offenders were 23% more likely than white offenders to receive longer sentences. Although initial differences in sentence length were reduced by legally relevant variables (such as criminal history, current offence seriousness, plea, acceptance of responsibility), a direct effect remained (Everett and Wojkiewicz, 2002: 201). Court location, age, gender and education also failed to explain this difference. More importantly, Everett and Wojkiewicz (2002: 205-206) identified that this disparity only occurred for violent offences (interaction effect). In other words, Indigenous American offenders were more likely to receive significantly harsher sentences for violent offences, but not for other offences.

Weinrath (2007: 23-24) analysed sentence length for 237 male drunk drivers sentenced to custody in Alberta (Canada). Results showed that while Indigenous status had no direct impact on the length of imprisonment term, Indigenous offenders aged 20-29 receive shorter sentences than any other group. Leniency was not however extended to other Indigenous age groups. Relying on the concept of offender constraints (from the focal concerns approach), utilising the positive discrimination thesis, Weinrath (2007: 24) argued that the judiciary might perceive younger Indigenous offenders as being less blameworthy than their non-Indigenous counterparts because of their "often low socioeconomic status and perceived difficulties managing their drinking." However, negative discrimination was also purported because with, "increasing age, there was a greater likelihood of stereotypes of chronic alcoholism being attributed to older Aboriginal

offenders" leading these offenders to be seen as unable to control their drinking and thus, more dangerous, unreformable and risky" (Weinrath, 2007: 24).

Analysis of sentences of young Indigenous offenders suggest that their Indigenous status may have an effect on length of sentence, independent of legal factors, such as offence seriousness and prior criminal history. In a study of youth sentenced in courts in five Canadian cities, Latimer and Foss (2005: 487) did not find a direct relationship between Indigenous status and the likelihood of receiving a custodial sentence, after adjusting for legal factors. However, once sentenced to custody, Indigenous youth were nearly twice more likely to receive a secure custody sentence, and significantly more likely to receive longer custodial terms than their non-Indigenous counterparts, regardless of differences in criminal history, current crime seriousness, age, and gender (Latimer and Foss, 2005: 488-491). A later re-analysis of the data questions the finding of an Indigenous effect on sentence length, showing that the Indigenous effect disappears once location (or city) is taken into account (Doob and Sprott, 2007). In short, as the population of Indigenous youth are disproportionately likely to reside in areas which have a more punitive orientation, the Indigenous effect may be an artefact of differing sentencing practices (Latimer and Foss, 2005: 111-119). Although, Doob and Sprott fail to adequately consider the possibility of sentencing disparity within each city location, their re-analysis does point to the potential importance of area (or regional) variation in the treatment of Indigenous youth.

Australian research: sentencing Indigenous people

In Australia, sentencing research of the standard conducted in the U.S. is sparse. Aside from the more recent studies undertaken by Snowball and Weatherburn (2006 and 2007), Jeffries and Bond (2009 and 2010), Barrett, (2006) and the now more dated research of Gallagher and Poletti (1998), Australian researchers have only utilised basic exploratory statistical techniques (i.e. cross-tabulations), and the number of other potentially important sentencing factors considered has been minimal.

Baker (2001: 7), for example, found differences in sentencing outcomes by Indigenous status among offenders with prior convictions in New South Wales' Local Courts for those convicted of assault. Nearly 70% of Indigenous male offenders with prior convictions were imprisoned, compared with only around 34% of non-Indigenous male offenders with priors; approximately 30% of Indigenous female offenders with prior convictions were imprisoned compared with just 15% of non-Indigenous females with priors. In contrast, first time offenders were unlikely to be imprisoned, regardless of Indigenous status, age or gender.

Similarly, a study conducted in the Northern Territory found that four out of five imprisonment sentences were imposed on Indigenous people, and a greater proportion of Indigenous people with prior records were sentenced to imprisonment than non-Indigenous people. In contrast to the study in New South Wales, twice the proportion of Indigenous first time offenders (3.1%) were imprisoned compared to non-Indigenous offenders (1.7%) (Luke and Cunneen, 1998: 9).

Whether these differences between Indigenous and non-Indigenous offenders are evidence of discrimination cannot be determined. Each study used cross tabular analyses which showed what proportion of Indigenous versus non-Indigenous offenders, with certain characteristics, received what sentences. Cross tabulations can only control for a small number of alternative factors (usually one), and cannot provide estimates of the strength of these relationships. What is needed are analyses that take into account the influence of all relevant sentencing determinants. Without this methodological approach evidence of Indigenous differences in sentencing is at best only suggestive of discrimination (Von Hirsch and Roberts, 1997: 228). As outlined previously, multivariate analytic techniques such as regression analyses are typically utilised in North American and Canadian sentencing research because these enable researchers to estimate the separate independent (direct) impact of variables, controlling for other variables of interest and also enable interaction effects to be investigated (Von Hirsch and Roberts, 1997: 228).

The use of more rigorous methodological techniques to explore the impact of Indigenous status on sentencing has recently emerged in Australia (see Gallagher and Poletti, 1998; Barrett, 2006; Snowball and Weatherburn, 2006; Snowball and Weatherburn, 2007; Bond and Jeffries, 2010; Jeffries and Bond, 2010). In comparison to the North American and Canadian Indigenous sentencing studies overviewed earlier, this body of Australian research has included a wider range of different sentencing determinates in their research designs, making the research particularly robust. Findings show that Indigenous status matters in sentencing, sometimes, but not always to the disadvantage of Indigenous offenders.

Snowball and Weatherburn (2006 and 2007) provide the first attempts in Australia to systematically investigate, using methodologically rigorous techniques, the direct impact of Indigenous status on adult sentencing. Using a sample of 93,130 adult offenders (having legal representation, no past prison sentence, and not on remand for another offence) sentenced in New South Wales' courts, Snowball and Weatherburn (2006) found no significant difference between Indigenous and non-Indigenous offenders in the likelihood of imprisonment (for their principal offence), after controlling for a large range of legal factors including: offence seriousness, presence of

violence, number of concurrent offences, number of prior criminal convictions, plea, as well as the age and gender of the offender. These results suggest that Indigenous status plays little or no independent role in the sentencing process, once other relevant sentencing factors are controlled. Thus, any initial differences between Indigenous and non-Indigenous offenders in the likelihood of imprisonment can be attributable to pre-existing differences in offending and past criminal histories (2006: 14). Snowball and Weatherburn's (2006) research therefore supports the differential involvement hypothesis.

In their 2007 study, Snowball and Weatherburn addressed some of the limitations of their earlier sample, by including offenders previously imprisoned and who appeared without legal representation. Results were generally supportive of the differential involvement thesis, showing that the higher rate at which Indigenous offenders in New South Wales were sent to prison could be explained in the most part by: a) the more serious and more frequent nature of their current and past offending, and b) their more frequent breach of noncustodial sanctions (Snowball and Weatherburn, 2007: 287). However, a "residual effect of race on sentencing" was also found, suggesting that "racial bias may influence the sentencing process even if its effects are only small" (Snowball and Weatherburn, 2007: 286). Snowball and Weatherburn's more methodologically sound 2007 research therefore uncovered a small yet direct relationship between Indigenous status and sentencing. Indigenous offenders were slightly more likely than their non-Indigenous equivalents to be incarcerated.

Of particular interest, Snowball and Weatherburn (2007: 286) also found that Indigenous status had a positive interactive effect with prior criminal history. With all other factors being equal, criminal history aggravated sentence severity more substantially for non-Indigenous defendants. This contradicts U.S.-based research showing that African American and Latino offenders with serious prior criminal records are treated more harshly than white offenders under the same circumstances (Spohn, 2000: 461). Consistent with a focal concerns understanding of sentencing Snowball and Weatherburn (2007: 286) speculate that perhaps "judicial officers, like many in the broader community, are very concerned about Indigenous overrepresentation in prison [community and political constraints]", resulting in a more positive outcomes for Indigenous offenders than similarly-situated non-Indigenous offenders.

In an analysis of a matched sample of Indigenous and non-Indigenous adults sentenced in South Australia's higher courts, Jeffries and Bond (2009) also found that the effect of Indigenous status was not always to the detriment of offenders. In contrast to Snowball and Weatherburn (2007), it was found that Indigenous offenders were *less* likely than their non-Indigenous counterparts to be sentenced to a term of imprisonment, independent of other legal, demographic and

culpability factors. Indigenous status, in this case, appeared to have a direct yet positive effect on sentence severity, at least for the decision to imprison. In other words, support for the positive discrimination hypothesis was found.

Nonetheless, when sentence length was decided, Indigenous offenders were sanctioned more harshly than their non-Indigenous equivalents. In contrast to non-Indigenous offenders, Indigenous offenders were sentenced to longer periods of imprisonment when they appeared before the court under like circumstances. In this case, the direct relationship between Indigenous status and sentencing disadvantaged Indigenous offenders (Jeffries and Bond, 2009).

Consistent with the focal concerns perspective, judges sentencing in South Australia could be influenced by the constraints inherent in Indigenous status itself. According to Jeffries and Bond (2009), the significant direct yet positive impact of Indigenous status on the decision to imprison may indicate that Indigenous offenders are perceived as less blameworthy than their non-Indigenous counterparts, possibly due to Australia's legacy of colonisation, associated Indigenous social and economic marginalisation and the potential exacerbating consequences of imprisonment.

Further, this study suggests that South Australian judges are influenced by political expectations of the criminal justice system post-Royal Commission and, the potential role of sentencing in reducing Indigenous over-representation (Jeffries and Bond, 2009). There is some additional evidence for such an interpretation. In recent years a number of Australian jurisdictions have developed alternative ways of sentencing Indigenous people. For example, Indigenous and circle sentencing courts acknowledge and seek to address the differential needs of Indigenous defendants. These courts theoretically recognise Indigenous status in the sentencing process (Powell, 2001; Harris, 2004; Marchetti and Daly, 2004; Tomaino, 2004; Harris, 2006). In case law, precedent also exists in some jurisdictions for factors associated with Indigenous status (e.g. associated disadvantage) and Indigenous status itself (e.g. historical legacy of colonisation) to mitigate sentencing (see discussion by Edney, 2003; Edney and Bagaric, 2007: 246). Some international research has also raised the possibility that judges may be compensating for differential treatment by police and other earlier criminal justice decisions (see for example Dannefer and Schutt, 1982).

The opposite direction for sentence length may be an artefact of the earlier lenience at the initial sentencing stage (Jeffries and Bond, 2009). Perhaps judges in South Australia felt, after giving Indigenous offenders numerous 'chances' by diverting them from custody, that retribution, incapacitation and deterrence needed to be prioritised. Again utilising a focal concerns approach, Jeffries and Bond (2009)

argue that it is possible that practical constraints emanating from broader community expectations are at this sentencing stage taking precedence over the special needs of Indigenous offenders and societal expectations post Royal Commission. Populist penal sentiment has, in recent times, exerted a great deal of pressure on the courts to 'get tough' on crime, especially on more serious offences such as those being sentenced in South Australia's higher courts.

In 2010, Jeffries and Bond extended their quantitative study of sentencing in South Australia's higher courts through qualitative analyses of Indigenous offenders' sentencing stories. This research supported their prior statistical findings regarding the initial decision to imprison and provided further evidence in favour of the positive discrimination hypothesis. Using remarks made at sentencing by judges for the same cohort of offenders examined in their 2009 statistical study, Jeffries and Bond (2010) found that consistent with the 'focal concerns' approach to sentencing, Indigenous status affected judicial assessments of blameworthiness and risk in ways that perhaps mitigated sentence severity more substantially for Indigenous offenders. In addition, Indigenous offenders were viewed differently in terms of offender level constraints and broader consequences.

- First, compared with non-Indigenous offenders, descriptions of Indigenous familial circumstances in childhood and adulthood were more frequently rooted in dysfunction and trauma. Indigenous trauma was further described as being exacerbated by dislocation or isolation from community and culture, living in communities ravaged by dysfunction, and relative societal marginalisation and disadvantage. Jeffries and Bond (2010) argue that combined these circumstances may have reduced assessments of blameworthiness, and thus provided a basis for mitigating sentence severity for Indigenous defendants.

- Second, assessments of risk were also affected by Indigeneity. As a source of informal social control, community and cultural reconnection was considered important for Indigenous offenders and acted as an Indigenous-specific mitigating circumstance.

- Third, imprisonment was construed as a harsher form of punishment for Indigenous offenders and as a significant social cost to Indigenous communities. This same logic was not used in the sentencing remarks of non-Indigenous offenders. Arguably, by taking Indigeneity into account, the South Australian judiciary may be responding to Australia's post-Royal Commission environment. Judges demonstrated awareness in their remarks of the differences between Indigenous and non-Indigenous Australians and the possible role sentencing could play in exacerbating Indigenous marginalisation.

Using higher court data from Western Australia, Bond and Jeffries (2010) examined whether Indigenous women were more likely than non-Indigenous women to receive a sentence of imprisonment for comparable offending behaviour and histories over a nine year period (1996 to 2005). Corresponding to the results from the statistical study in South Australia, findings suggested that Indigenous women were generally less likely than their non-Indigenous counterparts to receive a sentence of imprisonment. In other words, Indigenous status was again found to have a direct yet positive impact on sentencing. In line with previous arguments made in the South Australian context, the authors note that, "in Western Australia a degree of judicial cognisance may exist around the special circumstances of Indigenous women and that this in turn may explain why Indigenous women may be less likely than non-Indigenous women to be imprisoned". Of some concern, however, were findings that any special consideration extended to Indigenous women appeared to dissipate over time. Since 2000, the likelihood of imprisonment for Indigenous women, compared to non-Indigenous women under similar circumstances, was found to have significantly decreased. Bond and Jeffries (2010) argue that, "social, economic, political, and historical differences between Indigenous and non-Indigenous women subsist to the benefit of the latter" and "under these unequal circumstances, equitable (rather than equal treatment is arguably the more just response".

In contrast to the adult sentencing research, recent work on young offenders is more suggestive of negative discrimination. Both Gallagher and Poletti (1998) and Barrett (2006) found that Indigenous status may disadvantage young offenders in the sentencing process. For instance, Gallagher and Poletti's (1998:12) study compared youth sentencing outcomes for offenders from different ethnic groups including young Indigenous offenders. The researchers compared the sentencing outcomes of Indigenous/Anglo pairs matched on principal offence type and seriousness (defined as the offence receiving the most serious penalty out of all the offences in a case), prior criminal record, plea, number of sentenced counts, police bail outcomes, age, court location (i.e. Childrens or lower court). Although Gallagher and Poletti (1998: 14-17) found that there were no differences between Indigenous and Anglo matches in the likelihood of incarceration, young Indigenous offenders were more likely than their Anglo matches to receive community service and supervised orders, while young Anglo offenders received more fines than their Indigenous matches. Thus, significant direct negative relationships were found between the penalties imposed by Indigenous status with young Indigenous offenders receiving more severe penalties (community service or supervised orders compared to fines). In line with attribution theory (although not identified as such), Gallagher and Poletti (1998: 25) suggest that racial prejudices and stereotyping by the judiciary might explain why Indigenous young people are sentenced harsher than their Anglo counterparts.

Barrett (2006) was primarily interested in the pathway of young male offenders through the juvenile justice system in Queensland. No direct relationship between Indigenous status and sentencing (custodial order) was found for young male offenders, after controlling for past and current crime seriousness. However, being held in custodial remand appeared to be more detrimental to Indigenous offenders. Young male offenders who had been held on remand were more likely to receive a custodial order, and this relationship appeared stronger for young Indigenous offenders (Barrett, 2006:127). Barrett (2006: iv) concludes that, "as young male Aboriginal offenders progressed deeper into the system there was evidence of cumulative disparity, particularly along the remand pathways, meaning that the probability of being in custody increases as the offender progresses from one custodial stage to the next custodial stage".

STUDYING INDIGENOUS DISPARITY IN SENTENCING

A number of key issues should be considered in future studies of Indigenous disparity in sentencing, namely: 1) the need to consider a wide range of potential sentencing determinates, 2) the need to use multivariate models and, 3) the need to examine sentencing as a two-stage process.

The need to consider a wide range of potential sentencing determinates

Sentencing courts have the discretion to consider a wide range of aggravating and mitigating circumstances surrounding offenders and their offences. Under the *Penalties and Sentences Act 1992*, Queensland adult courts can take into account factors such as: the offender's character, age, and intellectual capacity; the offender's prior offending record; the nature of the offence and harm caused by the offender; as well as likelihood of rehabilitation and evidence of remorse (s.9(2)). In addition, in the sentencing of Indigenous offenders, the court must consider submissions made by community justice group representatives, which may include "cultural considerations" (s.9(2)(p)). Similarly, under the *Youth Justice Act 1992*[4], factors that can be considered at sentencing include: nature and seriousness of the offence, child's previous offending history, and impact of the offence on the victim, age, importance of rehabilitation and re-integration of the young person into the community.

However, although the statutory framework allows for a broad range of considerations in the sentencing decision, precedent establishes that Indigenous offenders do not gain leniency based solely on their Indigenous status (see e.g. *Neal v R* (1982) CLR 305). Instead, any

[4] The name of the *Juvenile Justice Act 1992* was updated to *Youth Justice Act 1992* by the *Juvenile Justice and Other Amendment Act 2009*, which commenced on March 2010.

particular consideration for Indigenous adult offenders is based on their "background, education, cultural outlook" (Queensland Court of Criminal Appeal in *R v Gibuma and Anau* (1991) 54 A Crim R 347at 349). For a fuller discussion of the legal principals underlying the sentencing of Indigenous offenders, see Anthony (in press). For young Indigenous offenders consideration must be given to the "child's relationship to the child's community", or "any cultural consideration" (see *Youth Justice Act 1992, s.150* [g]).

Similarly, past literature suggests the following factors or variables should be considered when undertaking sentencing disparities research:

1. Offenders' Social History - In addition to Indigenous status (Jeffries and Bond, 2009), past research suggests that other aspects of offender's social histories may mitigate sentencing outcomes, including:
    a. Sex of offender. There is an extensive body of research examining gender disparities in sentencing, with at least some evidence that female offenders may be treated differently (see Daly and Bordt, 1995for a review).
    b. Age of offender. Youthfulness or old age may also mitigate sentence (White and Perrone, 2005:155).
    c. Familial situation of offender. Researchers have argued that strong familial ties (including have the responsibility for the care of others) indicate increased levels of informal social control in an offender's life. The presence of high levels of informal social control may lessen the likelihood of imposing formal controls to prevent future offending (Kruttschnitt, 1982; Kruttschnitt, 1984; Kruttschnitt and Green, 1984; Kruttschnitt and McCarthy, 1985; Daly, 1987a; Daly, 1987b; Daly, 1989a; Daly, 1989b; Steury and Frank, 1990: 418-419; Jeffries, 2002a; Jeffries, 2002b; Jeffries, Fletcher and Newbold, 2003).
    d. Employment status of offender. Similar to familial ties, employment participation may mitigate sentencing outcomes because it is seen to exert a degree of informal social control over an offender's life. Compared to their unemployed peers, employed offenders may be seen as 'less deviant' because they are positively contributing to mainstream societal expectations of 'good citizens' (Jeffries, 2002a; Jeffries, 2002b; Jeffries, Fletcher and Newbold, 2003).

2. Current Case Characteristics - Seriousness of a case can be measured by a number of factors relating both to the type of offence, as well as to the context in which the offence occurred. These include:

a. Seriousness of offence often based on statutory classifications or prescribed penalties (Andersson, 2003; White and Perrone, 2005: 155) and the number and seriousness of concurrent offences.
b. The role of the offender in the offence i.e. was the offender the sole perpetrator, key protagonist, or did they play an ancillary role (Hall, 1994; White and Perrone, 2005: 155).
c. The presence of co-offenders, i.e. offending committed in groups may aggravate crime seriousness simply because a group of offenders is perceptually more 'scary' than an individual offender (Daly, 1994: 95; Ashworth, 1995: 129-130).
d. Whether the offence occurred in public or private (Jeffries, Fletcher and Newbold, 2003).
e. Evidence of premeditation involved in the commission of the offence (Hall, 1994: 115-116; Hesketh and Young, 1994: 49-50; Ashworth, 1995: 131; White and Perrone, 2005: 155).

3. Criminal History - The impact of criminal history serious on sentencing is generally determined by the number of prior convictions, period of time between convictions and history of similar offending (Hagan, 1975; Pennington and Lloyd-Bostock, 1987; Albonetti, 1991; Bickle and Peterson, 1991; Hesketh and Young, 1994: 52; Ashworth, 1995: 162-164; Rattner, 1996; White and Perrone, 2005: 155; Jeffries, Fletcher and Newbold, 2003; Weidner, Frase and Pardoe, 2004; Weidner, Frase and Schultz, 2005).

4. Court Process Factors - These include presence of a guilty plea, number of conviction counts and most serious remand outcome (in custody or on bail). Prior research suggests that entering a guilty plea provides some indication of remorse, saves the court time and money, and thus may reduce sentence severity (White and Perrone 2005: 155). In contrast, being convicted of more than one offence (which may increase the time taken to process a case) and being held in custodial remand at the time of conviction may increase sentence severity (Kruttschnitt and Green, 1994; Flood-Page and Mackie, 1998; Fitzgerald and Marshall, 1999; Jeffries, Fletcher and Newbold, 2003).

5. Culpability or Blameworthiness Variables - research shows that personal histories of abuse and victimisation (both in childhood and adulthood), and poor physical and mental health (including substance abuse or misuse) may mitigate sentence, as they may change judicial assessments of the offender's level of culpability (Allen, 1987a; Allen, 1987b; Allen, 1987c; Worrall, 1990; Jeffries, 2002a; Jeffries, 2002b; Jeffries, Fletcher and Newbold, 2003; White and Perrone, 2005: 155).

The need to use multivariate models

It is clear from the prior research that to gauge the influence of Indigenous status on sentencing requires disentangling the influence of other potential sentencing determinates to estimate direct and/or interaction effects.

The need to examine sentencing as a two-stage process

The initial decision regarding sentence type (e.g. imprisonment or community based sentence) and then, a second decision regarding sentence length (Steffensmeier, Kramer, and Streifel, 1993; Spohn, 2000: 456-457; Steffensmeier and Demuth, 2001: 158; Mueller, Connelly and Pingel, 2004). Research suggests that the relationship between Indigenous status and sentencing may vary by sentencing stage (Spohn, 2000: 456-457; Jeffries and Bond, 2009).

CONCLUSION

Initial baseline differences in the sentences of Indigenous and non-Indigenous offenders are well-documented, especially for custodial orders. There are three key hypotheses that could explain these apparent differences. First, the differences are a function of *differential involvement* in criminal and other behaviours by Indigenous and non-Indigenous offenders. In other words, there are pre-existing differences between Indigenous and non-Indigenous offenders on crucial factors that influence the sentencing decision, which then result in differential sentencing outcomes. Second, the disparity between the outcomes for Indigenous and non-Indigenous offenders is a consequence of *negative discrimination*, which may well be based on unintentional and unconscious perceptions of racial threat. Sentencing decisions are guided by particular focal concerns (blameworthiness and harm caused, community protection, practical constraints). Judicial perceptions and assessments of blame, risk and threat could be influenced by stereotypical attributions based on offender characteristics like minority group status especially when sentencing under constrained conditions (i.e. limited time and information). The final *positive discrimination* hypothesis suggests that racial/ethnic/Indigenous disparity in sentencing could favour minority group offenders, resulting from a level of judicial cognisance around pre-existing societal power imbalances between Indigenous and non-Indigenous people, and the potential for courts to further perpetuate these disparities if judicial power is used ineffectually. The judiciary could recognise that social, economic, political and historical differences between Indigenous and non-Indigenous Australians exist usually to the benefit of the later, and that, under these unequal circumstances, equitable (rather than equal) treatment via lenient sentencing is a more 'just' response. Furthermore, judges may be

influenced by political and community expectations post-Royal Commission and the potential role of sentencing in reducing Indigenous over-representation.

International research on racial and ethnic disparities in sentencing is well-established, primarily focusing on the effect of being African American or Latino. The current standard requires multivariate techniques to estimate the separate independent (direct) impact of variables, controlling for other variables of interest, as well as interaction effects. In contrast, research on Indigenous disparities in sentencing has been much sparser, both internationally and in Australia. However, recent work in Australia has attempted to address this neglect, through more rigorous designs and analyses.

This research has shown that Indigenous offenders may be treated more harshly than non-Indigenous offenders, irrespective of legal factors such as current and past criminality. However, Australian research also suggests that there are points at which Indigenous offenders may receive more favourable treatment, compared to non-Indigenous offenders in like circumstances, at least for adults. Consistent with a focal concerns approach, explanations for this pattern have focused on the potential mitigating factor of the historical and social circumstances surrounding Indigenous offenders.

In the next two chapters of this report we will provide results from multivariate statistical sentencing analyses of Indigenous versus non-Indigenous adult and youth defendants. The purpose of these analyses is to ascertain: a) if sentencing outcomes for Indigenous youth and adult offenders differ from those for non-Indigenous youth and adult offenders, b) whether disparity is evident across the spectrum of sentencing outcomes, c) what factors influence sentencing outcomes, and whether these differ for Indigenous and non-Indigenous offenders?

Chapter 2: An Examination of Indigenous Adults Sentenced in the Lower and Higher Courts

The chapter presents results from our statistical analyses of a sample of cases of adult offenders convicted in Queensland's Magistrates, District and Supreme Courts between 2006 and 2008. The purpose of these analyses is to ascertain: a) if sentencing outcomes for Indigenous adults differ from those for non-Indigenous adults, b) whether disparity is evident across the spectrum of sentencing outcomes, c) what factors influence sentencing outcomes, and whether these differ for Indigenous and non-Indigenous adult offenders?

The first sample consists of 1,000 cases where offenders were convicted in the Magistrates Court. The second sample from the District and Supreme Courts contains a total of 1,200 convicted offenders' cases.[5] The Magistrates Court sample is comprised of 50% Indigenous offenders, 50% female offenders, with a sample mean age of 30.1 years. In terms of prior criminal history, the mean number of prior convictions was approximately 14.0 and the mean number of prior terms of imprisonment served was 1.93. The overwhelming majority had been convicted of multiple counts (90.1%), and had made a final plea of guilty (83.5%). In contrast, just under 4% were known to be on remand at the time of the sentencing hearing. The higher courts sample comprised of 49.4% Indigenous offenders, 48.2% female offenders, with a sample mean age of 31.2 years. Most entered a final plea of guilty (83.7%); few were convicted of multiple counts (9.9%). The mean number of prior convictions was 19.5, with a mean number of prior terms of imprisonment served of 2.8.

Information used in the analyses were obtained from four main sources: (1) court administrative data maintained by the Department of Justice and Attorney-General; (2) administrative data held by the Magistrates Court Branch; (3) criminal history data extracted by the Queensland Police Service; and (4) sentencing remarks from the Queensland Courts State Reporting Bureau (higher courts only). The criminal history extracts and sentencing remarks were manually coded for use in the analyses.

The analyses reported in this chapter compare the sentencing outcomes on record[6] for adult Indigenous and non-Indigenous offenders for their principal offence. We define principal offence as the offence that received the highest sentencing penalty. The analyses also

[5] Offenders convicted of offences with mandatory life sentences were excluded from the sample, as there was no judicial discretion to explain.

[6] Any later conversion of sentences (e.g. monetary orders to community service), or adjustment of sentence length based on time served on remand, are not covered by the scope of this project.

identify factors that predict sentencing outcomes.[7] To do this, we examine the sentencing outcomes for cases, rather than individual offenders. We focus on cases because the administrative data does not contain a unique identifier for individual offenders, and is not structured in such a way to allow for the unique identification of individual offenders. It was only possible to distinguish between events involving the same offender that occurred on the same day. Thus, some individuals may appear more than once in the sample. (Due to nature of the offences processed in each court, this is more likely in the Magistrates Court than the higher courts). However, the use of cases as the unit of analysis is common in sentencing disparities research.[8]

After briefly discussing some important data collection and other methodological issues that have implications for the analyses, we report the results as follows:

- initial "baseline" differences in sentencing outcomes by Indigenous status,
- differences in sentencing factors by Indigenous status,
- differences in sentencing outcomes by Indigenous status after adjusting for other factors known to influence sentencing,
- comparison of the impact/weighting of sentencing factors by Indigenous status.

KEY DATA AND OTHER METHODOLOGICAL ISSUES

There were a number of data collection and other methodological issues that influenced the design and analysis of the sentencing data. In particular, there are two issues that should be noted: (1) the lack of viability of analyses for all convicted offenders in Queensland; and (2) difficulties in extracting the required information on offenders' backgrounds and cases.

Lack of Viability of Analyses for all Convicted Offenders
Trend and regional analyses of all cases in which offenders were sentenced in Queensland for a particular period were not viable due to the limited nature of information in the available administrative databases. For example, defendants' criminal history information, one of the most important factors in sentencing decisions, could not be made available by the Department of Justice and Attorney General. For the purposes of our quantitative analyses, we required number of past convictions, the number of past convictions in the same offence category, and the number of past terms of imprisonment (see Appendix A for details of the definition and measurement). To obtain

[7] See appendix A for further details on data and variables included in the analyses.
[8] Although these are samples of cases, we will use the term "offender" for ease of reference.

this information, we received permission to have criminal history reports downloaded from the relevant Queensland Police Service database. These reports were then manually coded.[9] Thus, the manual collection of criminal history for all defendants sentenced in Queensland for a particular period is highly impractical. Any analyses without this crucial information would not have been useful in providing evidence for further evaluation and policy around Indigenous sentencing disparities.

As a result of the need to code some data manually, our statistical analyses are based on two samples of offenders convicted between mid-2006 and mid-2008. The samples in both the lower and higher court were selected using a randomised stratified procedure. To ensure adequate numbers of Indigenous (and particularly Indigenous female) cases in the samples, all cases with convictions between 2006 and 2008 were split into four groups: Indigenous male, Indigenous female, non-Indigenous male, non-Indigenous female. Cases were then randomly selected from each group to obtain 250 (Magistrates Court) and 300 (higher courts) cases in each. Due to missing data, the sample in the analyses may be smaller.

Difficulties in extracting required information

The project was complicated by the need to go to multiple sources to obtain information on the key factors that influence sentencing outcomes. Extracting criminal history, remand status, and offenders' social background from the main court administrative database maintained by JAG was not possible. Thus, we went to Magistrates Court Branch for remand information, Queensland Police Service for criminal history information, and written transcripts of judicial sentencing remarks for social background information (higher courts only). Some of this information was then manually coded to be included in the analyses.

At the Magistrates Court level, sentence hearings are not transcribed into written documents and are only available in audio format. Unfortunately, our request to access sentencing audios was unsuccessful due to a combination of ethical concerns and associated resource constraints within the Magistrates Court Branch.[10] Thus, our analyses for adult offenders in the Magistrates Court cannot account for the influence of other crucial sentencing variables such as, offence contexts (e.g. presence of co-offenders, evidence of premeditation), other mitigating and aggravating circumstances (e.g.

[9] The manual coding of the criminal history reports was conducted under strict conditions that coding occurred on site and identifying information was not recorded.

[10] In order to find the hearings of the cases in our sample, researchers could have heard recordings of closed hearings (e.g. proceedings involving child victims). Due to these ethical concerns, the identification of the recordings for our sample would need to have been extracted by staff from the Magistrates Court Branch. Unfortunately, resource and staffing issues meant that this was onerous and impractical.

substance abuse, health, familial circumstances, employment status, past experiences of victimisation)

Even after accessing multiple data sources, some information could not be determined for our cases. For example, absence of information in sentencing remarks about offenders and their cases may mean that a submission or other report was not made, or it may mean that the judge chose not to mention it. Some factors could not be included in our analyses as there were insufficient cases on which we had information (e.g. nature of victim-offender relationship). In addition, many measures are rough as more detailed information was not available (for instance, for adult sentencing, our measure of "being on remand" is based on the last known bail status of the offender, rather then whether the offender had ever been on remand at any stage in the processing of their cases).

Further, our analyses of cases in the Magistrates Court do not account for some alternative programs, such as Queensland's Indigenous Alcohol Diversion Program and the Murri Court. Due to the need to use samples for the analyses, the number of cases for programs offered in a specific location (e.g. Queensland's Indigenous Alcohol Diversion Program) was too small for viable analyses. We were also unable to compare the sentencing outcomes of Indigenous offenders before the mainstream Magistrates Court and Indigenous offenders in the Murri Court, as there was no way of identifying Murri Court cases in the main administrative dataset. At last count there were 17 Murri Courts operating in Queensland (The Honourable Cameron Dick, Attorney General and Minister for Industrial Relations, Ministerial February 16th 2010). The available specialist databases were not able to identify all Murri Court sites, and consequently, the analyses reported in this chapter do not include a Murri Court indicator.

INITIAL BASELINE DIFFERENCES IN SENTENCING OUTCOMES BY INDIGENOUS STATUS

Tables 2.1 and 2.2 (below) report the distribution of the most serious sentencing outcome for the principal offence between Indigenous and non-Indigenous offenders. To assist in the interpretation of patterns, sentencing outcomes were grouped into types of orders. Due to the different levels of seriousness of cases heard in the lower and higher courts, sentencing orders were grouped differently.

For the Magistrates Court, we examined the following groups of sentencing outcomes:

- immediate orders of imprisonment (including cumulative orders),

- noncustodial orders (such as suspended order of imprisonment, intensive correction order, probation, good behaviour bond, community service orders),[11]
- disqualification of drivers' licence orders,
- monetary orders (such as fines, restitution, compensation),
- convicted and discharged.[12]

In the Magistrates Court, there is a statistically significant relationship between Indigenous status and sentencing outcomes. Compared with non-Indigenous defendants, a larger proportion of Indigenous offenders received sentences of imprisonment (7.8% and 2.4% respectively) and monetary orders (61.6% and 51.4% respectively) (see Table 2.1). Conversely, a smaller proportion of Indigenous offenders (12.4%) than non-Indigenous defendants (28.8%) had their drivers' licences disqualified (see Table 2.1).

Table 2.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Magistrates Court Queensland, (2006-2008)

Type of Sentence Order	Total offenders (%)	Indigenous offenders (%)	Non-Indigenous offenders (%)
Imprisonment	5.1	7.8	2.4
Noncustodial	14.5	13.8	15.2
Disqualification of drivers' license	20.6	12.4	28.8
Monetary	56.5	61.6	51.4
Convicted but discharged	3.3	4.4	2.2
Total	100.0	100.0	100.0
Total number of cases	1,000	500	500

Pearson's $chi^2 = 55.54$, d.f.=4, $p<0.0001$

In the higher courts, there was also a statistically significant relationship between Indigenous status and sentencing. For similar technical reasons around number of cases, we also grouped sentencing outcomes for the higher court analyses, specifically:

[11] Although at first glance these may appear very disparate orders, there were two rationales for this grouping. First, there were methodological reasons for grouping the orders together. For instance, there were only 21 suspended sentences of imprisonment, four intensive correction orders, and 35 probation orders. Thus, the small number of cases meant that we needed to group orders together for meaningful empirical analyses. Second, although suspended sentences of imprisonment and intensive correction order are defined in legislation as sentences of imprisonment, offenders receiving these orders are released into the community under particular conditions, just as orders of supervised and unsupervised bonds. Thus, these orders were grouped together. The only reason for maintaining imprisonment as a separate category for the Magistrates Courts analyses is due to its prominence as an outcome of interest in the research literature. (With only 5.1% of the sample receiving imprisonment, there was only just sufficient numbers to estimate separate models.)

[12] "No conviction recorded" is not a penalty outcome, but a separate decision made by a magistrate or judge. For example, in our lower adult court sample, 32.8% of convicted offenders had no conviction recorded. Of these, only 3.7% had no penalty (discharged, or admonished and released) as a sentencing outcome. Although this decision is not part of the range of penalty outcomes examined in this report, exploratory analyses of the lower court sample suggest that there that there may be no significant Indigenous effect on the decision not to record a conviction, adjusting for key legal factors, age and sex.

- immediate orders of imprisonment (including cumulative orders),
- suspended sentences of imprisonment,
- bond with supervision order (intensive corrections order and probation),
- other penalty orders (not including disqualification of drivers' licence and monetary orders),
- convicted but discharged.

As we might expect, the majority of offenders received an order of imprisonment (37.9%). As in the lower courts sample, compared to non-Indigenous defendants a higher proportion of Indigenous offenders received an order of imprisonment (41.0% compared to 34.7%). A greater proportion of Indigenous offenders (18.2%) also receive a supervised bond (non-Indigenous offenders = 16.3%). In contrast, a lower proportion of Indigenous offenders (15.7%) received suspended sentences of imprisonment compared to non-Indigenous offenders (21.8%). Of particular interest, in contrast to non-Indigenous offenders (13.2%) a larger percentage of Indigenous offenders (17.2%) were convicted but discharged.

Table 2.2. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Higher Courts Queensland, (2006-2008)

Type of Sentence Order	Total offenders (%)	Indigenous offenders (%)	Non-Indigenous offenders (%)
Imprisonment	37.9	41.0	34.7
Suspended sentence of imprisonment	18.8	15.7	21.8
Bond with supervision	17.3	18.2	16.3
Other penalty orders	10.9	7.9	14.0
Convicted but discharged	15.2	17.2	13.2
Total	100.0	100.0	100.0
Total number of cases	1,200	598	600

Pearson's $chi^2 = 23.30$, d.f.=4, $p<0.0001$

INITIAL BASELINE DIFFERENCES IN SENTENCE LENGTH/PENALTY AMOUNT BY INDIGENOUS STATUS

We then examined the mean differences in sentence length/penalty amount between Indigenous and non-Indigenous offenders for both levels of courts. The results of these analyses are reported in Tables 2.3 (lower courts) and 2.4 (higher courts).

Table 2.3. Indigenous and Non-Indigenous Initial Baseline Differences in Mean Length/Penalty Amount of Most Serious Sentencing Outcome, Principal Offence, Magistrates Court Queensland, (2006-2008)

Mean Sentence Length/Penalty Amount	Total offenders	Indigenous offenders	Non-Indigenous offenders
Imprisonment (in mths)	4.89 (51)	4.77 (39)	5.27 (12)
Noncustodial order (in mths)	8.09 (144)	9.06 (68)	7.22 (76)
Disqualification of drivers' licence order (in mths)	6.7 (206)	6.75 (62)	6.70 (144)
Monetary order (in dollars)	307.01 (565)	270.84 (308)	350.35 (257)

Notes:

a. Number of cases is reported in brackets.
b. Three offenders were sentenced to imprisonment until the rising of the court. This was treated as the equivalent to 1 day. Of those receiving noncustodial orders, one offender was dropped as there was no length was recorded. Hours, days and weeks were converted to a fraction of a month. Discharge orders (no term is relevant) are not included.
c. Shaded areas represent a statistically significant difference between Indigenous and non-Indigenous offenders at the $p<0.05$.
d. *The Penalties and Sentences Act* (s.49) allows for one fine to be imposed to cover 2 or more offences. The proportion of offenders in our sample with multiple convictions is small: only 9.1% of offenders had more than one conviction. There remains a statistically significant difference between Indigenous and non-Indigenous mean amounts, after removing cases with more than one conviction.

For the Magistrates Court, we found only one significant difference in sentence length/penalty amount between Indigenous and non-Indigenous offenders: non-Indigenous offenders had significantly higher amounts for monetary orders ($350.35) than Indigenous offenders ($270.84) (see Table 2.3, above). In the higher courts, there were significant differences in sentence length between Indigenous and non-Indigenous offenders for term of imprisonment, suspended and supervised bond. For all three sentencing outcomes, the mean term is less for Indigenous offenders than non-Indigenous offenders (see Table 2.4, below).

Table 2.4. Indigenous and Non-Indigenous Initial Baseline Differences in Mean Length of Most Serious Sentencing Outcome, Principal Offence, Higher Courts (Queensland, 2006-2008)

Mean Sentence Length	Total offenders	Indigenous offenders	Non-Indigenous offenders
Imprisonment (in mths)	21.0 (455)	16.5 (245)	26.4 (208)
Suspended sentences of imprisonment (in mths)	18.8 (225)	15.1 (94)	21.5 (131)
Bond with supervision (in mths)	17.3 (207)	15.9 (109)	18.8 (98)
Other noncustodial orders (in mths)	7.8 (26)	9.9 (7)	7.1 (19)

Notes:

a. Number of cases is reported in brackets.
b. Twenty-four offenders were sentenced to imprisonment until the rising of the court. This was treated as the equivalent to 1 day. Of those receiving other penalty orders, hours, days and weeks were converted to a fraction of a month. Just over 4% received monetary orders as the most serious sentencing outcome, with a mean amount of $560.77. These cases are not included in the table. Discharge orders (no term is relevant) are not included.
c. Shaded areas represent a statistically significant difference between Indigenous and non-Indigenous offenders at the $p<0.05$.

DIFFERENCES IN SENTENCING FACTORS BY INDIGENOUS STATUS

The purpose of the analyses reported in this section is to explore whether there are any differences between Indigenous and non-Indigenous offenders in case and offender characteristics. Differences in case and offender characteristics might explain the initial differences in sentencing outcomes. As noted in Chapter 1, prior research has identified a range of case and offender characteristics that influence sentencing outcomes. These include:

- offender's *social history information*, such as sex, age at time of sentencing, familial situation, and employment history,
- offenders' *criminal history*, including number of prior convictions, number of prior convictions in the same offence category as the current sentenced offence, and number of prior imprisonment terms,
- offenders' *current case characteristics*, such as seriousness of principal offence, offenders' role in the offence, presence of co-offenders, offence location, and evidence of premeditation,
- *court processing factors*, including plea, number of conviction counts, and most recent remand outcome (i.e. in custody or not),
- *culpability factors*, such as health (mental and physical), substance abuse and victimisation.

Unfortunately, as discussed earlier in this chapter, only limited offender and case information is available for the Magistrates Court sample; while for the higher court sample, much of this information had to be coded from judicial sentencing remarks, where the absence of the identification of a factor was coded "not mentioned". However, despite accessing multiple data sources, there remains a substantial missing data problem in the higher court sample. A fuller description of the variables used in these analyses can be found in Appendix A.

These analyses suggest that differences in the circumstances of offenders and their cases may, at least in part, explain initial differences in sentencing outcomes (see Tables 2.5 and 2.6). As shown in Table 2.5, in the Magistrates Court, Indigenous offenders have a higher mean prior criminal history compared to non-Indigenous offenders (28.84 vs 8.30 respectively). Indigenous offenders were also more likely to be on remand (5.4%) than non-Indigenous offenders (1.8%). In contrast, Indigenous offenders were less likely to have entered a final plea of guilty (78.6%) than non-Indigenous offenders (88.4%).

Table 2.5. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Magistrates Court (Queensland, 2006-2008)

Offender and Case Characteristics	Total offenders	Indigenous offenders	Non-Indigenous offenders
Social background			
Indigenous	50.0%	---	---
Female	50.0%	50.0%	50.0%
Mean age (in years)	30.14	29.90	30.37
Prior criminal history			
Mean prior criminal history	18.60	28.84	8.30
Current case characteristics			
Mean seriousness principal offence	45.21	46.38 (33.31)	44.01
Court processing factors			
Convicted of multiple counts	90.1%	8.2%	10.0%
Entered a final plea of guilty	83.5%	78.6%	88.4%
On remand (last known)	3.6%	5.4%	1.8%
Total number of cases	1,000	500	500

Notes:
a. Table reports means or percentages as indicated.
b. Shaded areas represent a statistically significant difference between Indigenous and non-Indigenous offenders at the $p<0.05$.
c. Higher scores on prior criminal history and current offence seriousness represent more extensive criminal history or more serious offence seriousness.
d. Court processing factors are coded as '1' for yes and '0' for no.
e. See the appendix for a detailed description of variables.

There is a similar pattern of significant findings for case and court processing factors in the higher court sample. As revealed in Table 2.6 (below), Indigenous offenders have a significantly higher mean prior criminal history (34.1 vs 17.0), more likely to be on remand (15.2% vs 4.7%), and are less likely to be convicted of multiple counts (80.9% vs 86.8%), than non-Indigenous offenders.

In addition, for the higher court sample, we have some information on other types of background and case characteristics, such as childcare responsibilities, in paid employment, context of current offence, and health and substance abuse. Recall that these measures are interpreted as whether or not the factor of interest (say substance abuse) was mentioned by the judge in the sentencing remarks. (A fuller description of the variables can be found in the appendix.) Thus, any differences between Indigenous and non-Indigenous offenders are differences in explicit judicial recognition of the existence of a factor. Almost all these context and background factors are rarely mentioned by judges in their transcripts of sentencing.

Except for an ongoing substance abuse problem, there are significant differences in judicial identification of these background and case characteristics between Indigenous and non-Indigenous offenders (see Table 2.6). For instance, non-Indigenous offenders are more likely to have the location of their offence mentioned (20.8% in a private place)

and the existence of childcare responsibilities noted (19.4%), compared to Indigenous offenders (0.0% and 0.2% respectively). The one exception is the noting of evidence of premeditation: Indigenous offenders are more likely to have this identified by the judge than non-Indigenous offenders (22.8% compared to 1.7%). Without further research, it is difficult to determine the underlying mechanisms resulting in these differences in the sentencing remarks. There are a number of potential explanations: these findings may reflect differences in workload and thus the time to deliver fuller sentencing remarks; differential assessments by judges of the importance of these factors for Indigenous and non-Indigenous offenders; or are due to the existence of extensive social problems for certain groups of offenders being so typical that judges do not feel compelled to mention their existence.

Table 2.6. Indigenous and Non-Indigenous Differences on Key Case and Offender Characteristics, Principal Offence, Higher Courts (Queensland, 2006-2008)

Offender and Case Characteristics	Total offenders	Indigenous offenders	Non-Indigenous offenders
Social background			
Indigenous	49.9%	---	---
Female	48.3%	49.3%	47.3%
Mean Age (in years)	31.2	29.9	32.5
Childcare responsibilities noted	9.9%	0.2%	19.4%
In paid employment noted	5.3%	0.2%	10.5%
Prior criminal history			
Mean prior criminal history	25.0	34.1	17.0
Current case characteristics			
Mean seriousness principal offence	98.3	100.2	96.3
Took a primary role noted	2.9%	0.0%	5.8%
Presence of co-offenders noted	3.3%	0.0%	6.6%
Occurred in a private place noted	10.4%	0.0%	20.8%
Evidence of premeditation noted	12.3%	22.8%	1.7%
Court processing factors			
Convicted of multiple counts	9.8%	9.0	10.5
Entered a final plea of guilty	83.9%	80.9%	86.8%
On remand (last known)	9.9%	15.2%	4.7%
Culpability factors			
Poor health noted	6.6%	0.2%	13.0%
Substance abuse identified	12.2%	11.7%	12.8%
Past victimisation experiences noted	2.3%	0.0%	4.7%
Total number of cases	1,200	598	600

Notes:

a. Table reports means or percentages as indicated. For some variables, the sample size reduces to 1,056.
b. Shaded areas represent a statistically significant difference between Indigenous and non-Indigenous offenders at the $p<0.05$.
c. Higher scores on prior criminal history and current offence seriousness represent more extensive criminal history or more serious offence seriousness.
d. Court processing factors are coded as '1' for yes and '0' for no.
e. See the appendix for a detailed description of variables.

In summary, Tables 2.1 to 2.6 clearly show that there are differences in the cases and outcomes of Indigenous and non-Indigenous offenders in the lower and higher courts. Thus, the next section examines whether these differences in case and offender characteristics explain, at least in part, the initial differences in sentencing outcomes for Indigenous and non-Indigenous offenders.

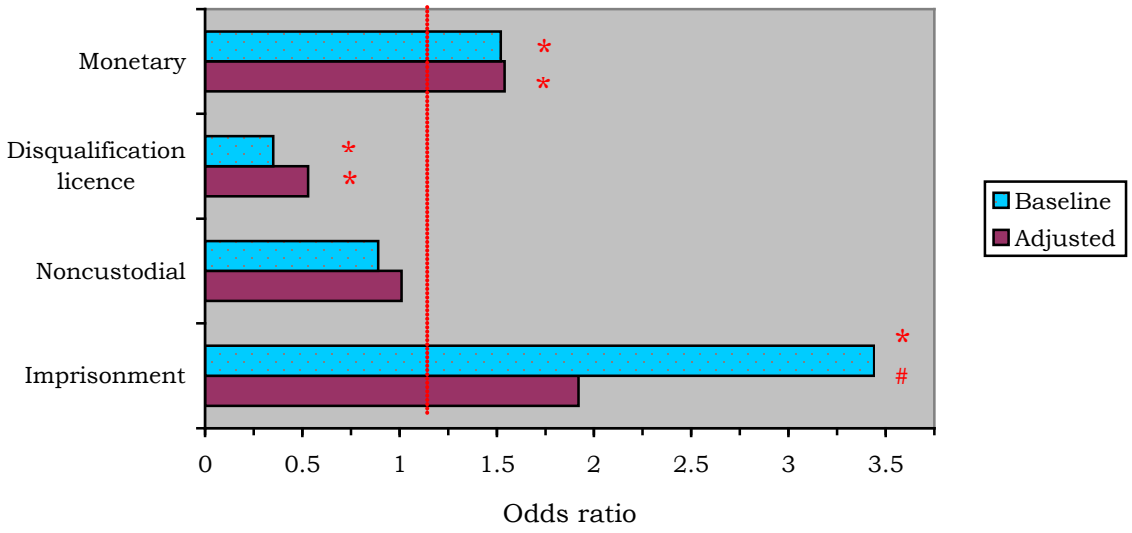
ADJUSTED DIFFERENCES IN SENTENCING OUTCOMES BY INDIGENOUS STATUS

To explore the extent to which offender and case characteristics explain sentencing outcomes, we estimated logistic regression models which allow us to estimate the influence of Indigenous status, after adjusting for the effects of other factors known to influence sentencing outcomes. The logistic regression models the likelihood of a particular sentencing outcome (compared to all other outcomes). The results are reported as odds ratios, which can be interpreted as the likelihood of receiving that sentencing outcome (rather than all the other outcomes) for a one-unit increase in the predictive factor of interest. For example, if the odds ratio for "being Indigenous" is 1.5, then Indigenous offenders are (on average) 1.5 times more likely than non-Indigenous offenders to receive that sentencing order, adjusting for all other factors under consideration. Conversely, if the odds ratio is 0.5, Indigenous offenders (on average) are 50% less likely than non-Indigenous defendants to receive that sentencing order.

Before discussing the results, there are a few technical issues that should be noted: 1) due to the small numbers receiving particular sentencing orders, we grouped sentencing outcomes for the purposes of these analyses. In the lower court sample, we model four sentencing order types: imprisonment, noncustodial order (such as suspended order of imprisonment, intensive correction order, probation, good behaviour bond, community service orders), disqualification of drivers licence, monetary orders. In the higher courts sample, we examine imprisonment, suspended sentences of imprisonment, supervised bond, other orders (not including disqualification of drivers' licence and monetary orders), and discharge (without penalty) orders, 2) the full range of factors could not be included in all models for two main reasons. First, as already discussed in this chapter, some information was not available (especially for the lower court sample). Second, in some models, factors had to be dropped as there was no variation across the outcome of interest, or there were too few cases. For example, in the imprisonment model for the lower court, the presence of a final guilty plea could not be included as there were no cases of a not guilty plea with sentences of imprisonment. For the higher court models, background and case measures with 5% or less of the sample were not included, 3) missing data also impacted our analyses. For example, the higher court sample reduced from 1,200 to 1,037 for some models.

Figures 2.1 (lower court results) and 2.2 (higher court results) report the odds ratios for Indigenous status for each sentencing order group, adjusting for other offender and case characteristics. The bars in each figure represent the size of the odds ratio, and not the statistical significance of the effect. Symbols on the top of the bars show the results of tests of statistical significance (see note b to Figures 2.1 and 2.2). In reading these figures, odds ratios moving towards a value of 1.0 (indicated by the dotted line) represent greater parity between Indigenous and non-Indigenous offenders.

Figure 2.1. Influence of Indigenous Status on the Likelihood of Most Serious Sentencing Outcome, adjusting for Key Case and Offender Characteristics, Principal Offence, Magistrates Court (Queensland, 2006-2008)



# p<0.10 *p<0.05

Notes:

a. Figure shows odds ratio for Indigenous status on each type of sentencing order, adjusted for sex, age, prior criminal history, seriousness of principal offence, presence of multiple conviction counts, final guilty plea (except imprisonment outcome), on remand (except for disqualification of drivers' licence) and on bail.

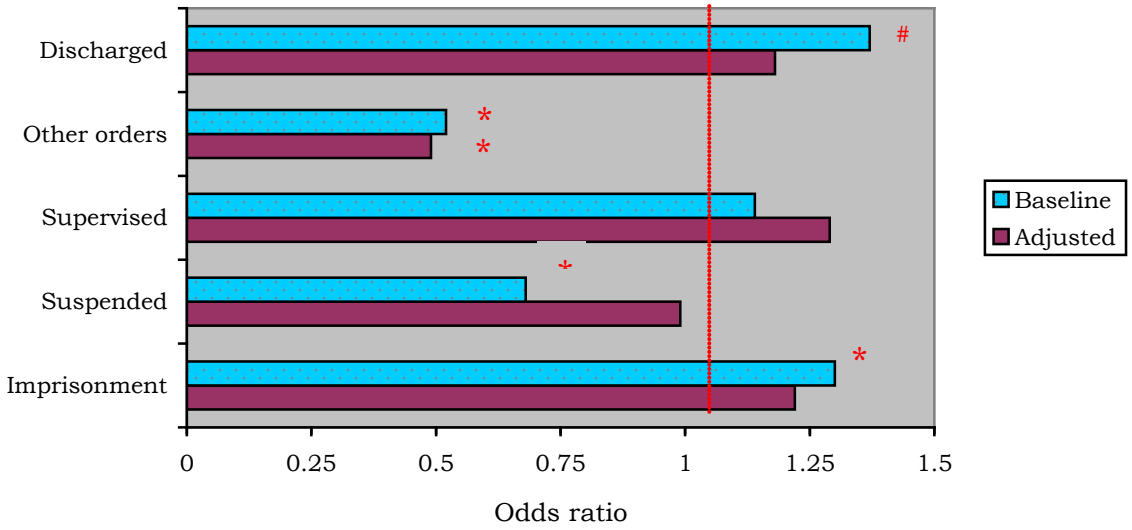
b. Red line indicates equal odds. Symbols on the top of the bars indicate statistically significant estimates.

For the Magistrates Court, these analyses show that there remains some difference between Indigenous and non-Indigenous offenders for certain sentencing outcomes, after adjusting for demographic characteristics, legal characteristics of their cases, and court processing factors (see Figure 2.1, above). In particular, initially, Indigenous offenders are more likely to have a sentence of imprisonment than their non-Indigenous counterparts. Adjusting for demographic, legal and court processing factors reduced the initial difference between Indigenous and non-Indigenous offenders for the decision to imprison (compared to all other order types). This finding suggests that the initial baseline difference between Indigenous and non-Indigenous offenders is explained in part by differences in other

characteristics that influence sentencing decisions. Nonetheless, a significant difference between Indigenous and non-Indigenous defendants remained. Indigenous defendants remained nearly two times more likely than non-Indigenous offenders to receive a prison sentence. Indigenous offenders are 1.6 times more likely to receive a monetary order compared to non-Indigenous offenders, and 53% less likely to have their drivers' licence suspended. Interestingly, for the decision to suspend drivers' licences, adjusting for other factors amplifies the effect of Indigenous status, suggesting that Indigenous status is strongly associated with some of these factors.

Unlike the pattern of effects in the lower court sample, the analyses for sentencing outcomes in the higher courts show that initial significant baseline differences between Indigenous and non-Indigenous offenders disappear, except for other orders (not including disqualification of drivers' licence and monetary orders). For instance although there is a significant baseline difference between Indigenous and non-Indigenous offenders in the likelihood of an imprisonment order, this effect is no longer statistically significant after adjusting for other background, case and processing characteristics. This finding suggests that the initial difference is explained by differences in offender background, case and court processing factors. Similarly for the likelihood of a suspended sentence of imprisonment and a discharge order, the initial significant baseline effect for Indigenous status disappears once offender background and case characteristics are introduced. Indigenous offenders are 49% less likely to receive other orders (not including disqualification of drivers' licence and monetary orders), as non-Indigenous offenders, after adjusting for other factors under consideration. This result was statistically significant. However, as we could not include all factors identified in sentencing legislation and prior research, we cannot rule out that the effect of Indigenous sentence on this group of outcomes may not be explained by other mitigating and aggravating circumstances.

Figure 2.2. Influence of Indigenous Status on the Likelihood of Most Serious Sentencing Outcome, adjusting for Key Case and Offender Characteristics, Principal Offence, Higher Courts (Queensland, 2006-2008)



# p<0.10 *p<0.05

Notes:

a. Figure shows odds ratio for Indigenous status on each type of sentencing order, adjusted for sex, age, childcare responsibilities noted, prior criminal history, seriousness of principal offence, occurred in a private place noted, evidence of premeditation noted, presence of multiple conviction counts, final guilty plea, on remand (except supervised order and other noncustodial), poor health noted, and substance abuse problems noted.

b. Red line indicates equal odds. Symbols on the top of the bars indicate statistically significant estimates.

In short, the results show that, in the lower courts, differences in the sentencing outcomes for Indigenous offenders are occurring in imprisonment and monetary orders. This finding raises the question of whether these differences are due to the lack of viable community-based alternatives in certain regions (a point that is considered in later chapters). However, we must also stress that the lower court analyses do not take account of any mitigating or aggravating circumstances relating to the commission of the offence or the social background of offenders, which might explain the Indigenous disparities found in these analyses.

The higher court analyses indicate that the effect of Indigenous status only remained for one sentencing outcome group: other orders (not including disqualification of drivers' licence and monetary orders). There was no significant relationship between Indigenous status and imprisonment, suspended sentences of imprisonment, supervised bond, or discharge order after other offender and case factors had been included in the analyses. Even so, this conclusion remains tentative, as the social and other circumstances of current offending measures were crude and/or missing.

OTHER INFLUENCES ON TYPES OF SENTENCING OUTCOMES

In addition to the separate impact of Indigenous status, there are a number of significant effects on sentencing outcomes for other demographic, case and court processing characteristics. Our lower court results show, for example, that:

- *For the decision to imprison*, being on remand is the strongest significant predictor: offenders who are on remand (in custody) are approximately 7.5 times more likely to have an order of imprisonment than those not in custody, net of other factors. Both prior criminal history and offence seriousness significantly increase the likelihood of an imprisonment order. (Recall we could not include a final plea of guilty in this model as there were no cases of a not guilty plea, resulting in an imprisonment order).

- *Other noncustodial orders* (such as suspended order of imprisonment, intensive correction order, probation, good behaviour bond, community service orders), the strongest significant predictor was the presence of a final plea of guilt (offenders who made a final plea of guilty were just over five times more likely as those who did not make a final guilty plea, after adjusting for other factors). Seriousness of current offence and the presence of multiple counts were also significant predictors of the decision to use these noncustodial orders.

- *For the decision to order the disqualification of a drivers' licence,* major significant influences include prior criminal history (less likely as criminal history becomes more extensive), presence of multiple conviction counts (less likely), and final plea of guilt (more likely).

- *For the decision to award a monetary order,* current offence seriousness has a statistically significant effect: as offence seriousness increases, the likelihood of a monetary order decreases. Surprisingly, the presence of a final plea of guilt significantly reduces the likelihood of a monetary order, net of other factors in the model.

For instance, in the higher court analyses:

- *For the decision to imprison*, the two strongest significant predictors are being on remand (2.4 times more likely as those not on remand), and having the presence of childcare responsibilities being noted (2.2. times more likely as those without)[13]. Other factors that significantly increased the likelihood of a sentence of imprisonment were: more extensive criminal history, more serious current offence and entering a final plea of guilty. In addition, female offenders were significantly less likely to receive imprisonment than male offenders, net of other factors.

- *For the decision of a suspended sentence of imprisonment*, significant effects (in the direction that we would anticipate) include age at the time of sentencing, prior criminal history, current offence seriousness, and final guilty plea. Offenders convicted of an offence committed in a private place increased the likelihood of a suspended imprisonment term, compared to those convicted of offences committed in public spaces.

- *For the decision to award a supervised bond*, female offenders are significantly 2.3 times more likely to have a supervised order, compared to male offenders, holding all other factors constant. A more extensive prior criminal history significantly reduces the likelihood of a supervised order.

- *for the decision of other order* (not including disqualification of drivers' licence and monetary orders), offenders with higher prior criminal histories or more serious current offending have significantly lower odds of receiving these types of orders.

- *for the decision to discharge*, increasing current offence seriousness significantly reduces the likelihood of a discharge after conviction.

ADJUSTED DIFFERENCES IN SENTENCE LENGTH/PENALTY AMOUNT BY INDIGENOUS STATUS

We investigated multivariate analyses of the effect of Indigenous status on sentence length/penalty amount, adjusting for other factors known to influence sentencing. Sentence length/penalty amount was modelled using negative binomial regression, which enabled us to address the skewed distribution of length/amount of sentencing

[13] This finding was unexpected, as prior research indicates that the presence of childcare responsibilities acts as a mitigating factor for sentencing. However, we must remember that our measure represents whether the judge mentioned childcare responsibilities in his/her remarks at sentencing. A preliminary re-examination of the sentencing remarks suggests a tendency for childcare responsibilities to only be noted in cases where judges were unable to give full consideration to these responsibilities due to the circumstances of the offence and its seriousness.

orders, as well as to keep the original units of measurement. These analyses are exploratory as the numbers of offenders is small in some sentencing categories (e.g. only 51 offenders received a sentence of imprisonment in the lower court sample). This may mean that the results are unstable.

Although we advise caution in interpreting the results too broadly, these analyses suggest the following significant differences:

- *For the lower courts*, Indigenous status had a significant independent effect on the amount of a monetary order: Indigenous offenders (on average) receive approximately 87% of the number of dollars in monetary orders as non-Indigenous offenders, after adjusting for other demographic, case and court processing characteristics,

- *For the higher courts,* on average, Indigenous offenders receive significantly shorter terms of imprisonment and suspended sentences of imprisonment than non-Indigenous offenders: Indigenous offenders receive about 74% (imprisonment) and 71% (suspended sentences of imprisonment) of the number of months as non-Indigenous offenders, after adjusting for other background, case and court processing characteristics.

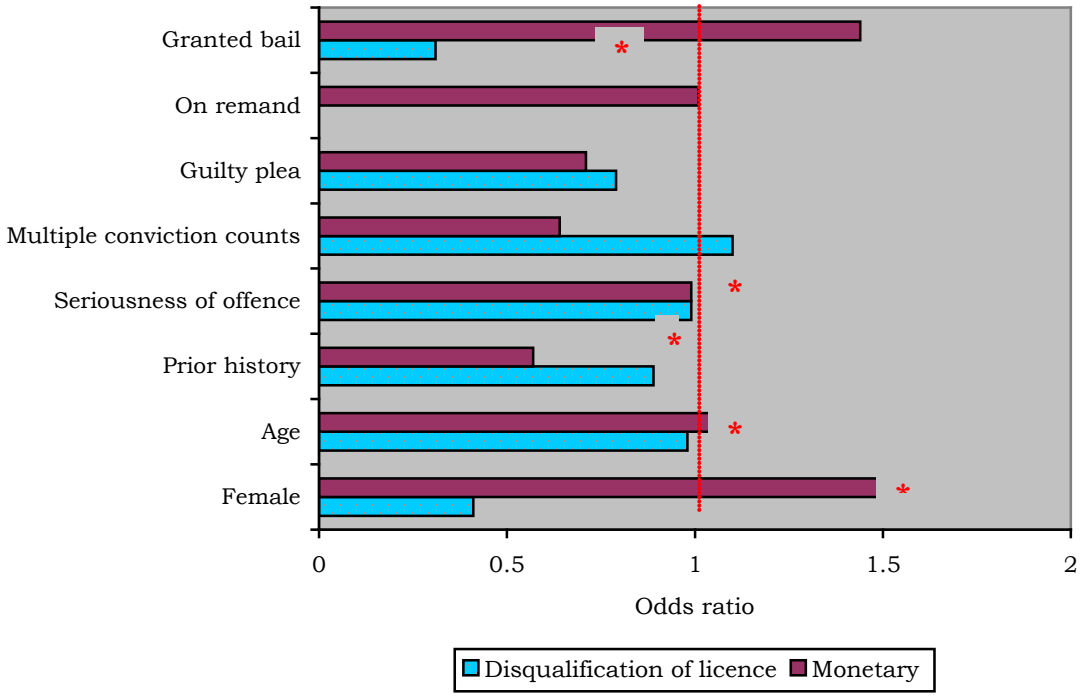
COMPARISON OF THE IMPACT/WEIGHTING OF SENTENCING FACTORS BY INDIGENOUS STATUS

As discussed in Chapter 1, any differences in sentencing between Indigenous and non-Indigenous offenders may also occur due to differential impact of sentencing determinants (i.e. interactive effects), such as offenders' social background, case characteristics and court processing factors. In other words, even if there is no direct effect of Indigenous status on sentencing, is the impact of each sentencing factor the same for both Indigenous and non-Indigenous offenders? This section presents a summary of the results of a series of analyses exploring whether different sentencing factors matter for Indigenous and non-Indigenous offenders in sentencing outcomes. Due to sample size considerations, especially the number of Indigenous offenders, we report the results for the two most common types of sentencing outcomes only: disqualification of a drivers' licence and monetary orders (in the lower courts); and imprisonment and suspended sentences of imprisonment (in the higher courts). (Due to small cases numbers multivariate analyses for sentence length/penalty amount were not prudent.)

Figures 2.3 (lower courts) and 2.4 (higher courts) present the differential impact for Indigenous offenders of each sentencing factor under consideration. The odds ratios show the effect on the sentencing outcome for an Indigenous offender, over and above the

effect for a non-Indigenous offender, holding constant all other factors in the model.

Figure 2.3. Differential Impact/Weighting of Sentencing Factors for Indigenous Offenders on Disqualification of a Drivers' Licence and Monetary Orders, Principal Offence, Magistrates Court (Queensland, 2006-2008)



*p<0.05

Notes:

a. Figure shows the odds ratio of each factor for an Indigenous offender on each type of sentencing order, estimated from a full interaction model that adjusts for all other factors under consideration.
b. Red line indicates equal odds. Symbols on the top of the bars indicate statistically significant estimates.

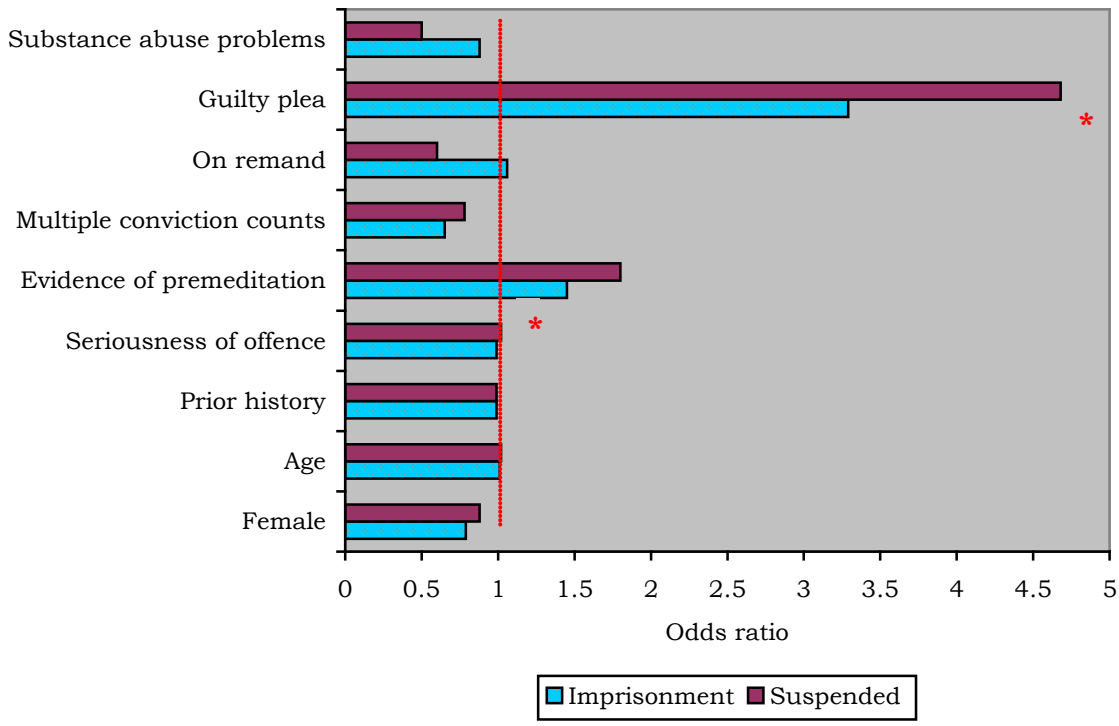
In short, these figures show that there are few significant differences in the weighting of sentencing factors for Indigenous offenders, compared to non-Indigenous offenders. For instance, net of all other factors, in the lower court sample (see Figure 2.3, above):

- Indigenous females are significantly less likely to have their licence suspended than non-Indigenous females,
- Indigenous offenders on bail are significantly less likely to have their licences suspended than non-Indigenous offenders on bail,
- for each year increase in age, Indigenous offenders are significantly more likely to receive a monetary order, compared to non-Indigenous offenders of the same age,
- in contrast, for increases in the extensiveness of prior history, Indigenous offenders are significantly less likely to receive a monetary order, compared to non-Indigenous offenders with the same priors (i.e. prior criminal history has less of an impact on the decision to grant a monetary order for Indigenous offenders).

Fewer significant differential effects for Indigenous offenders were found in the higher court analyses (which may be due to the distribution of Indigenous offenders in this sample, as well as the crude measure for social and circumstance of offending measures). What we did find was (see Figure 2.4, below):

- Indigenous offenders who made a final plea of guilty were significantly more likely to receive a sentence of imprisonment, compared to non-Indigenous offenders who plead guilty,
- for each unit increase in offence seriousness, Indigenous offenders are significantly more likely to receive a suspended sentence of imprisonment than non-Indigenous offenders with the same seriousness score (i.e. current offence seriousness appears to have a greater impact on the decision to suspend a prison term for Indigenous offenders).[14]

Figure 2.4. Differential Impact/Weighting of Sentencing Factors for Indigenous Offenders on Suspended Sentences of Imprisonment and Imprisonment, Principal Offence, Courts (Queensland, 2006-2008)



*p<0.05

Notes:

a. Figure shows the odds ratio of each factor for an Indigenous offender on each type of sentencing order, estimated from an interaction model that adjusts for all other factors under consideration. As there was none or one only Indigenous offender with childcare responsibilities noted, location of offence noted, and poor health noted, the differential effects of these factors could not be considered.

b. Red line indicates equal odds. Symbols on the top of the bars indicate statistically significant estimates.

[14] Give the range of offence seriousness (from 1 to 155), odds ratios of small magnitude (as here, 1.02) can have large cumulative effect over the range of the measure.

CONCLUSION

This chapter presented the key findings of statistical analyses of samples of adult offenders convicted in the lower and higher courts in Queensland. Its primary aim was to identify whether there was empirical evidence of Indigenous sentencing disparities both *direct* and *interactional* after adjusting for a range of other variables known to impact sentencing decisions.

Overall, in the lower court sample, we found some evidence of a *direct effect* between Indigenous status and sentencing. Controls for demographic characteristics, legal and court processing factors, 'closed the gap' in the initial base-line difference between Indigenous and non-Indigenous offenders at the first sentencing stage regarding sentence type. This finding provided some support for the *differential involvement hypothesis*. Nevertheless, direct Indigenous effects remained, compared to non-Indigenous adult offenders:

- Indigenous defendants were nearly twice more likely to receive a sentence of imprisonment,
- Indigenous defendants were 1.6 times more likely to receive a monetary order, but
- Indigenous defendants were 0.5 times less likely to have their drivers' licences suspended.

It could be argued that the higher likelihood of imprisonment for Indigenous adult defendants in the lower courts provides tentative support for the *negative discrimination hypotheses*. Under seemingly similar circumstances Indigenous defendants are being sentenced more harshly than their non-Indigenous counterparts. However, as we were not able to include measures of all known factors affecting sentencing in the lower courts, we cannot 'rule out' the strong possibility that the difference in the imprisonment sentencing decision (and the other sentences) might be explained by unmeasured offence (e.g. evidence of premeditation, presence of co-offenders, whether the offence occurred in public or private), social factors (e.g. employment status, familial situation) and culpability/blameworthiness factors (e.g. health, substance abuse, experiences of victimisation). Further, finding Indigenous offenders are more likely than non-Indigenous defendants to be imprisoned and receive monetary orders raises the question of whether this is due to a lack of viable community based sentencing alternatives in more remote areas where higher proportions of Indigenous people reside. This point is raised again in chapters 4 and 5 via results from the judges and magistrates' survey and community justice group consultations.

For the second lower court decision regarding sentence length/penalty amount, the only significant base-line difference by Indigenous status was in the amount of monetary orders. Indigenous offenders ($270.84) had significantly lower mean monetary orders than non-Indigenous offenders ($350.35). This base-line difference remained after adjusting for demographic characteristics, legal and court processing factors. In other words, Indigenous status appeared to have a *direct yet positive effect* on monetary order amount. By extension this is suggestive of *positive discrimination*. Once again however, it is possible that a more complete set of controls may have explained this difference. For example, we know that Indigenous people are far more likely to be unemployed and have lower incomes than non-Indigenous persons. It is therefore possible that lower monetary amounts for Indigenous offenders may reflect financial differences between them and non-Indigenous defendants but we were unable to control for this in our analyses.

Results for the initial sentencing stage regarding sentence type from our higher court analyses provided substantial support for the *differential involvement hypothesis*. Aside from noncustodial sentencing orders, base-line sentencing differences between Indigenous and non-Indigenous defendants dissipated once demographic, childcare, health, legal and court processing variables were controlled. *No significant direct effects* were therefore found between Indigenous status and the likelihood of:

- being discharged,
- receiving a supervised sentencing order,
- receiving a suspended sentence of imprisonment,
- receiving a sentence of imprisonment.

Indigenous offenders were however less likely to receive other noncustodial orders than non-Indigenous offenders, net of other factors.

Our analyses showed significant baseline differences by Indigenous status for sentence length/penalty amount in the higher courts. Indigenous defendants received shorter mean prison terms, suspended terms of imprisonment, and bonds with supervision. After controlling for demographic, childcare, health, legal and court processing variables, the following *direct effects* remained:

- Indigenous offenders received significantly shorter terms of imprisonment than non-Indigenous defendants,
- Indigenous offenders received significantly shorter suspended imprisonment terms than Indigenous defendants.

It could be suggested that shorter sentence lengths for Indigenous defendants in the higher courts provide support for the *positive*

discrimination hypothesis. However, it should be kept in mind that information on some variables could not be determined for our higher court cases because details may have been absent from the sentencing remarks.

Overall, results suggest that there were few significant differences in the weighting of different sentencing factors by Indigenous status. Nonetheless, there is some evidence that in the lower courts gender, remand status, age and criminal history may be *interacting* with Indigenous status to differentially impact some sentencing decisions. In the higher courts, plea and offence seriousness similarly appear to be having differential impacts by Indigenous status.

The next chapter examines youth sentencing in the Childrens Court of Queensland (District Court) and Supreme Court (i.e. higher courts).

Chapter 3: An Examination of Indigenous Youth Sentenced in the Higher Courts

The chapter reports results from our statistical analyses of a sample of cases of youth (aged 17 years or under at the time of sentencing) in the Childrens Court of Queensland (District Court) and Supreme Court (i.e. higher courts) between mid-2006 and mid-2008. The purpose of these analyses is to ascertain: a) if sentencing outcomes for Indigenous youth differ from those for non-Indigenous youth, b) whether disparity is evident across the spectrum of sentencing outcomes, c) what factors influence sentencing outcomes, and whether these differ for Indigenous and non-Indigenous young offenders?

The sample consists of the total number of unique cases in which youth were convicted in the higher courts (n=502). In total, there were approximately 28.1% Indigenous offenders, 13.9% female offenders, with a sample mean age of 16.1 years. About 41.3% of the sample had prior convictions mentioned at their sentencing hearings, 92.4% made a final plea of guilt, and 31.4% were reported in the sentencing remarks as being on remand.

For the purposes of these analyses, information was obtained from two main sources: (1) court administrative data maintained by the Department of Justice and Attorney-General; and (2) sentencing remarks from the Queensland Courts State Reporting Bureau (Queensland Department of Justice and Attorney General) (higher courts only). Information contained in the transcripts of judicial sentencing remarks was manually coded.

As in the previous chapter, similar conceptual and methodological issues affected our analyses. First, our analyses compare the sentencing outcomes for young Indigenous and non-Indigenous offenders for their principal offence (the offence that received the highest sentencing penalty). Second, the unit of analysis is again cases—rather than individual offenders—as the administrative data does not allow for the identification of individual offenders.[15] It was only possible to distinguish between events involving the same offender that occurred on the same day. Consequently, some individuals, especially high offending youth, may appear more than once in the sample. Third, the limited nature of the data available in administrative data sets resulted in the need to manually collect and code information. To make this feasible, analyses are based on a sample of youth cases convicted in the higher courts (i.e. Childrens Court of Queensland (District Court) and Supreme Court). Due to the

[15] Although these are samples of cases, we will use the term "offender" for ease of reference.

numbers of children processed in the higher courts, once unique cases had been identified, the full population for the two-year period was used. Fourth, data collection was constrained by ethical concerns around the study of a vulnerable population (children and youth). Information about the context of the offence and the offenders' social background was coded from the judicial sentencing remarks. However, the absence of information in sentencing remarks about offenders and their cases does not indicate that this information may not be present, only that the judge chose not to mention it. Moreover, some factors could not be included in our analyses as there were insufficient cases on which we had information. Finally, our analyses are restricted to the cases of children heard in the higher courts. In part due to ethical considerations around studying a proceeding that is completely closed, we were unable to obtain sufficient information about the cases heard in the Childrens Magistrates Court to make any analyses viable.

The results are reported as follows:

1) initial "baseline" differences in sentencing outcomes by Indigenous status,
2) differences in sentencing factors by Indigenous status,
3) differences in sentencing outcomes by Indigenous status after adjusting for other factors known to influence sentencing,
4) comparison of the impact/weighting of sentencing factors by Indigenous status.

INITIAL BASLINE DIFFERENCES IN SENTENCING OUTCOMES BY INDIGENOUS STATUS

Similar to the analyses of adult sentencing, we grouped sentencing outcomes into seven types of orders:

- immediate order of detention, including cumulative orders,
- suspended order of detention (including conditional release orders),
- bond with supervision order (intensive supervision orders and probation),
- bond without supervision order (good behaviour bond),
- community service order and conferences,
- disqualification of drivers' licence order,
- convicted and discharged (with or without a warning).

Tables 3.1 (below) report the distribution of the most serious sentencing outcome for the principal offence between Indigenous and non-Indigenous youth offenders sentenced in the higher courts.

Table 3.1. Indigenous and Non-Indigenous Initial Baseline Differences in Most Serious Sentencing Outcome, Principal Offence, Higher Courts (Youth) (Queensland, 2006-2008)

Type of Sentence Order	Total offenders (%)	Indigenous offenders (%)	Non-Indigenous offenders (%)
Detention	11.2	11.2	11.1
Suspended sentences of detention	8.8	12.8	7.2
Bond with supervision	61.6	56.7	63.4
Bond without supervision	3.4	3.6	3.3
Community service/conference	5.0	3.6	5.5
Disqualification of drivers' licence	0.2	0.0	0.3
Convicted and discharged	10.0	12.1	9.1
Total	100.0	100.0	100.0
Total number of cases	502	141	361

Pearson's $chi^2 = 6.40$, d.f.=7, n.s.

As seen in Table 3.1, a larger proportion of Indigenous youth appear to receive a suspended sentence of detention (12.8%), compared to non-Indigenous youth (7.2%). A lower percentage of Indigenous youth received a bond with supervision (56.7% compared to 63.4%), and a higher proportion were convicted and discharged (with or without a reprimand) (12.1% compared to 9.1%). Not surprisingly, given the age of the sample, only one youth had his/her licence or permit suspended (0.2%). However, this pattern of an association between Indigenous status and sentencing outcomes was not statistically significant in this youth sample.

INITIAL BASELINE DIFFERENCES IN SENTENCE LENGTH/PENALTY AMOUNT BY INDIGENOUS STATUS

To further explore differences in sentencing, we compare the mean length of the types of sentencing outcomes by Indigenous status. Mean differences in sentence length between Indigenous and non-Indigenous offenders for the youth sample are provided in Table 3.2. This table does not include orders for which length is not applicable. We also excluded disqualification of drivers' licence orders as only one offender in this sample received this order. Only the mean difference in length for orders of a bond with supervision was statistically different (although small numbers in the other sentencing categories will have made it difficult to achieve significance).

Table 3.2. Indigenous and Non-Indigenous Initial Baseline Differences in Mean Length of Most Serious Sentencing Outcome, Principal Offence, Higher Courts (Youth) (Queensland, 2006-2008)

Mean Sentence Length	Total offenders	Indigenous offenders	Non-Indigenous offenders
Detention (in mths)	17.2 (93)	20.3 (31)	15.6 (62)
Suspended sentences of detention (in mths)	9.9 (79)	10.5 (24)	9.6 (55)
Bond with supervision (in mths)	17.5 (404)	15.7 (105)	18.2 (299)
Bond without supervision (in mths)	8.6 (22)	7 (6)	9.3 (16)
Community service (in hours)	66.2 (17)	56.7 (3)	68.2 (14)

Notes:

a. Number of cases is reported in brackets.
b. Orders were length is not applicable (conferencing, discharged) are not included in the table. Disqualification of drivers' licences were also not included, due to the very low numbers of offenders receiving this order (n=1).
c. Shaded areas represent a statistically significant difference between Indigenous and non-Indigenous offenders at the $p<0.05$.

In summary, our initial analyses suggest that there are few significant differences in sentencing outcomes between Indigenous and non-Indigenous youth, at least in this sample.

DIFFERENCES IN SENTENCING FACTORS BY INDIGENOUS STATUS

A key issue for the determination of sentencing disparities is whether there are differences in case and offender characteristics between Indigenous and non-Indigenous youth offenders which might explain any disparities, including interaction effects (see discussion in Chapter 1). As for our adult analyses in Chapter 4, we examine a range of factors, including: (1) offenders' *social background* (e.g. sex, age at time of sentencing, familial situation, school attendance history); (2) offenders' *criminal history* (e.g. presence of prior convictions, especially convictions in the same offence category); (3) offenders' *current case characteristics* (e.g. seriousness of principal offence, offenders' role in the offence, presence of co-offenders, offence location, evidence of premeditation); (4) *court processing factors* (e.g. plea, presence of multiple conviction counts, on remand); and (5) *culpability factors* (e.g. poor health, substance abuse).

Like the adult samples, we encountered difficulties in obtaining full information on all cases of young people sentenced in the higher courts. Much of this information was coded from judicial sentencing remarks; consequently, the information obtained is limited in some cases (e.g. there was only a reference to the existence of a current or past protection order in two of the sentencing remark transcripts). Missing data reflects that no sentencing remarks were found for that case. A full description of the variables used in the analyses can be found in the appendix.

Table 3.3 summarises the differences in young offenders' backgrounds and cases by Indigenous status. Indigenous youth are significantly

more likely to be female (19.2%) and have prior convictions noted in their sentencing remarks (52.0%), compared to non-Indigenous youth (11.9% and 36.0% respectively). Interestingly, compared to non-Indigenous youth, Indigenous youth are significantly less likely to have judges comment on their having an active role in their offence (60.8% vs 72.6%), and showing evidence of premeditation (14.7% vs 46.6%). Young Indigenous offenders are also less likely to make a final plea of guilt (88.7% compared to 93.9% of non-Indigenous youth).

Table 3.3. Indigenous and Non-Indigenous Differences on Key Offender and Case Characteristics, Principal Offence, Higher Courts (Youth) (Queensland, 2006-2008)

Offender and Case Characteristics	Total offenders	Indigenous offenders	Non-Indigenous offenders
Social background			
Indigenous	28.1%	---	---
Female	13.9%	19.2%	11.9%
Mean age (in years)	16.1	16.0	16.1
Family structure			
Lives with both biological parents	18.2%	6.9%	22.5%
Lives with single biological parent	12.2%	12.8%	12.0%
Attends school regularly	14.9%	13.7%	15.3%
Prior criminal history			
Has prior convictions	40.4%	52.0%	36.0%
Has prior convictions in same category	18.7%	22.6%	17.2%
Has prior terms of detention	6.2%	6.9%	6.0%
Current case characteristics			
Mean seriousness of principal offence	113.7	110.9	114.8
Had an active/equal role	69.4%	60.8%	72.6%
Committed with co-offenders	40.1%	39.2%	40.5%
Occurred in private	13.6%	9.8%	15.0%
Evidence of premeditation	37.8%	14.7%	46.6%
Court processing factors			
Convicted of multiple counts	9.8%	6.4%	11.1%
Entered a final plea of guilty	92.4%	88.7%	93.9%
On remand	31.4%	36.3%	29.6%
Culpability factors			
Poor mental health identified	6.5%	2.9%	7.8%
Substance abuse problem	21.6%	21.6%	21.6%
Past victimisation experiences	9.5%	12.8%	8.2%
Total	100.0	100.0	100.0
Total number of cases	502	141	361

Notes:

a. Table reports means or percentages as indicated. For some social information, the total sample size reduces to 369.
b. Shaded areas represent a statistically significant difference between Indigenous and non-Indigenous offenders at the $p<0.05$.
c. Higher scores on prior criminal history and current offence seriousness represent more extensive criminal history or more serious offence seriousness.
d. See the appendix for a more detailed description of the variables.

Tables 3.1 to 3.3 show that there are few initial differences in the sentencing outcomes of Indigenous and non-Indigenous youth in the higher courts, but that there are several differences in their backgrounds and cases.

ADJUSTED DIFFERENCES IN SENTENCING OUTCOMES BY INDIGENOUS STATUS

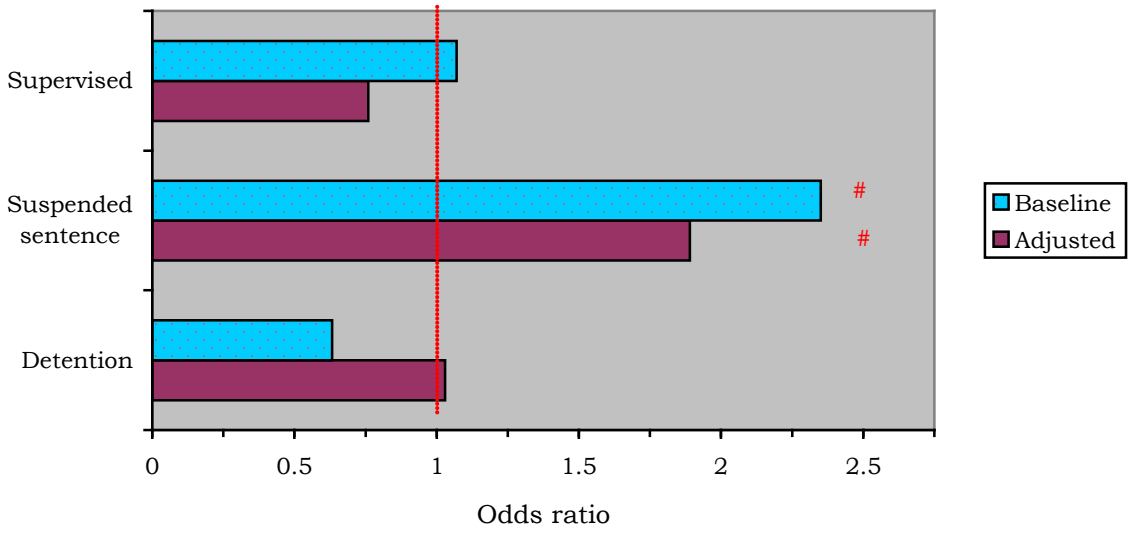
In this section we explore whether the differences in case and offender characteristics predict sentencing outcomes for young Indigenous and non-Indigenous offenders. To do this, we focus on the three most common sentencing outcome—detention, suspended sentences of detention, bond with supervision—due to sample size considerations. Also, we excluded case and offender characteristics when only present in less than 10% of the total sample.

To determine the separate (direct) influence of Indigenous status on detention, suspended sentences of detention and bond with supervision, after adjusting for other offender and case characteristics, we estimated logistic regression models. The results are reported as odds ratios. Recall that odds ratios are interpreted as the change in likelihood of an offender receiving a particular sentence (compared to all other orders) for a one-unit increase in the factor of interest. (For a brief description of the logistic regression model, see Chapter 2.)

Figure 3.1 presents the odds ratios for Indigenous status for detention, suspended sentences of detention and bond with supervision (relative to all other penalty orders), adjusting for other offender and case characteristics. The bars in each figure represent the size of the odds ratio, and not the statistical significance of the effect. Symbols on the top of the bars show the results of tests of statistical significance (see note b to Figures 3.1). In reading these figures, odds ratios moving towards a value of 1.0 (indicated by the dotted line) represent greater parity between Indigenous and non-Indigenous offenders.

Overall, these results (see Figure 3.1, below) support the tabular analyses discussed earlier in this chapter (see Table 3.1). Likely due to small sample sizes, results are only significant for suspended sentences of detention with results showing that: Young Indigenous offenders are 1.9 times more likely to receive a suspended sentence of detention, compared to non-Indigenous offenders (significant at $p<0.10$), after adjusting for other offender, case and court characteristics.

Figure 3.1. Influence of Indigenous Status on the Likelihood of Most Serious Sentencing Outcome, adjusting for Key Case and Offender Characteristics, Principal Offence, Higher Courts (Youth) (Queensland, 2006-2008)



# p<0.10 *p<0.05

Notes:

a. Figure shows odds ratio for Indigenous status on each type of sentencing order, adjusted for sex, age, intact family, prior convictions in the same offence category history, seriousness of principal offence, context of offence, presence of multiple conviction counts, final guilty plea, on remand, and had identified substance abuse problems.

b. Red line indicates equal odds. Symbols on the top of the bars indicate statistically significant estimates.

OTHER INFLUENCES ON TYPES OF SENTENCING OUTCOMES

There are a number of important predictors of sentencing outcomes for young offenders in the higher courts. Our models do lack power due to small numbers in certain categories (e.g. just less than 14% of the sample is female). Thus, our findings are tentative because only large sized influences are likely to be identified. Our results show that the young offender's age is an important predictor: older youth are significantly more likely to receive a detention order or a suspended sentence of detention, but less likely to receive a supervised bond (net of all other factors). Legal factors, such as the presence of prior convictions in the same offence category, increasing current offence seriousness, and being on remand, significantly increase the likelihood of receiving a detention order. Conversely, being on remand significantly reduces the likelihood of being sentenced to a supervised bond.

ADJUSTED DIFFERENCES IN SENTENCE LENGTH BY INDIGENOUS STATUS

Our next stage of analyses was to examine the effect of Indigenous status on sentence length, net of other factors known to influence sentencing. We focus on the length of a supervised bond order (measured in months). There were too few cases available for analysis for the other sentencing outcomes (all well below 50). Following the

analytic strategy in of adult sentencing, we modelled length of supervised bond using a negative binomial regression, which enabled us to address the skewed distribution of length of sentencing orders, as well as to keep the original units of measurement.

These analyses suggest that the initial baseline effect of Indigenous status (indicating shorter terms) (see Table 3.2) disappeared, after adjusting for other offender, case and court characteristics. In other words, when other factors were taken into account, the effect of Indigenous status was no longer statistically significant. This finding indicates that any initial difference in the number of months of a supervised bond between Indigenous and non-Indigenous youth was the result of differences in their social, case and court processing factors.

COMPARISON OF THE IMPACT/WEIGHTING OF SENTENCING FACTORS BY INDIGENOUS STATUS

The final series of analyses addressed the question of whether sentencing determinates are differentially weighted by Indigenous status (i.e. interaction effects) (see Chapter 1). That is, particular sentencing determinates may be more (or less) important in Indigenous offenders' cases, compared to non-Indigenous cases. Here we provide a summary of the results of analyses exploring whether different sentencing factors matter for Indigenous and non-Indigenous offenders in sentencing outcomes. Once again, due to sample size considerations, only results for the most common sentencing outcome are reported: supervised bond.

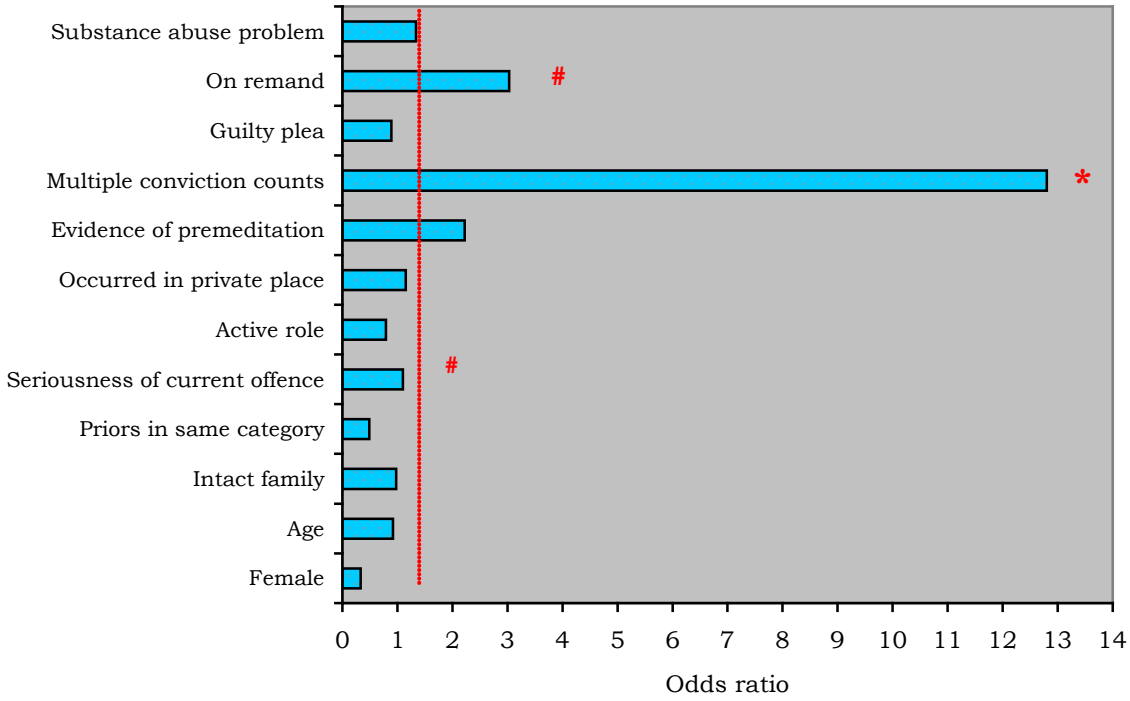
The differential impact on supervised bonds for Indigenous offenders is shown in Figure 3.2 (below). Odds ratios are reported, showing the effect of each sentencing factor on the likelihood of receiving supervised bond (compared to all other orders) for an Indigenous offender, over and above the effect for a non-Indigenous offender (net of all other factors).

In short, this figure shows that there are some significant differences in the effect on the sentencing outcome of a supervised bond between young Indigenous and non-Indigenous offenders. For instance, net of all other factors, (see Figure 3.2, below):

- Indigenous youth with multiple convictions are significantly more likely to receive a supervised bond than non-Indigenous youth with multiple convictions ($p<0.05$),
- as offence seriousness increases, Indigenous youth are significantly more likely to receive a supervised order, compared to non-Indigenous youth ($p<0.10$),

- Indigenous youth on remand are significantly more likely to receive a supervised bond than non-Indigenous youth on remand ($p<0.10$).

Figure 3.2. Differential Impact/Weighting of Sentencing Factors for Indigenous Youth Offenders on Supervised Bond Order, Principal Offence (Queensland, 2006-2008)



#p<0.10 *p<0.05

Notes:

a. Figure shows the odds ratio of each factor for an Indigenous offender, estimated from a full interaction model that adjusts for sex, age, intact family, prior convictions in the same category, history, seriousness of principal offence, active role in the offence, occurred in private place, evidence of premeditation, presence of multiple conviction counts, final guilty plea, on remand, and substance abuse problems identified.

b. Red line indicates equal odds. Symbols on the top of the bars indicate statistically significant estimates.

CONCLUSION

In this chapter, we summarised the key findings of statistical analyses of a sample of young offenders sentenced in the Childrens Court of Queensland (District Court) and Supreme Courts (i.e. higher courts). Our purpose was to empirically identify whether there was evidence of Indigenous disparities in the sentencing of young offenders, both *direct* and *interactional*, after adjusting for a range of other key sentencing determinates. Our analyses have been hampered by limited information across all cases, and consequently small analysis samples.

Our results suggest that, at least in the higher courts there are minimal differences in the types of sentences Indigenous and non-

Indigenous youth receive. In other words, we found little evidence of *direct disparity* by Indigenous status for the first sentencing stage. Initial base-line data for sentence type (where sample size allowed us to control for other sentencing factors in later analyses) suggested that: 1) Indigenous and non-Indigenous youth were equally likely to received sentences of detention, 2) Indigenous youth were slightly more likely than non-Indigenous young people to receive a suspended sentence of detention, 3) Indigenous youth were slightly less likely to receive a bond with supervision. However, none of these baseline differences by Indigenous status achieved statistical significance. Once substance abuse, other demographic characteristics, legal and court processing variables were controlled there continued to be no significant differences by Indigenous status in the likelihood of being sentenced to detention or a supervised bond. Nonetheless, there was a *direct significant effect* between Indigenous status and sentencing for the suspended detention sentencing decision. Young Indigenous offenders were nearly two times more likely than non-Indigenous young people to receive a suspended sentence of detention.

The above finding is suggestive of *discrimination* because under seemingly similar circumstances Indigenous young people are being sentenced differently from their non-Indigenous counterparts. However, whether or not this finding can be construed as *negative disparity* is unclear. Claims of *negative discrimination* would require demonstrating that Indigenous young people were being punished more harshly than their young non-Indigenous counterparts under similar circumstances. In the context of suspended terms of detention this is debatable. Although a suspended sentence could be viewed as harsh by virtue of the fact that any breach could trigger detention it does not have the intensive reporting requirements of other orders (e.g. supervised bonds). For offenders, suspended sentences of detention could therefore be construed as less restrictive (i.e. less of a punishment) than other non-custodial sentences with onerous reporting requirements. Further, it must be remembered that information on some variables in our analyses could not be determined because details may have been absent from the sentencing remarks.

Analyses of the second sentencing stage, length/penalty amount, produced only one significant difference at the base-line level. Before introducing controls for other sentencing determinates, Indigenous youth sentenced to a bond with supervision received shorter mean terms than non-Indigenous young people. After controlling for substance abuse, other demographic characteristics, legal and court processing variables this Indigenous effect disappeared. In other words, there was no evidence of a *direct effect* between Indigenous status and sentence length. Rather, our analyses of this second sentencing stage supported the *differential involvement hypothesis*.

With regard to *interaction effects* we found indications that sentencing factors in cases of supervised bond orders may be weighted differentially for young Indigenous and non-Indigenous offenders. More specifically remanded Indigenous youth with multiple conviction counts and serious criminal histories were significantly more likely than non-Indigenous youth with each of these characteristics to be sentenced to a supervised bond. Once again, this finding should be considered tentative given the previously discussed data issues.

The next two chapters summarise the main themes emerging from our consultations with key stakeholders in the sentencing process.

Chapter 4: Views Emerging from Project Consultations a Survey of Magistrates, Judges and Police Prosecutors

In this chapter, the findings of a survey of magistrates, judges and police prosecutors are presented. The purpose of the survey was to provide more context around the sentencing of Indigenous offenders. It should be noted that the views reported in this chapter are for the most part those expressed by legal professionals working within the Magistrates Court system. Police prosecutors do not practise in the higher courts, and only one judge completed the survey. [16]

DESCRIPTION OF SURVEY ADMINISTRATION

Both surveys were designed through a process of consultation. The content of the magistrates and judges survey required approval from the Chief Judge, Justice and Magistrate before being administered. The police prosecutors' survey was developed in consultation with Specialist Courts, Legal Services Branch (Queensland Police Service) and required approval from the Assistant Commissioner, Operations Support Command and the Manager, Review and Evaluation Unit (Queensland Police Service).

Because a consultation process was used to design the surveys, the number and content of the questions asked in each differed slightly. Nevertheless, each survey consisted of five sections. The first section sought background information about the magistrates, judges and prosecutors who had completed the survey. The second asked questions about the circumstances (mitigating and aggravating) that might commonly present in the sentencing hearings of Indigenous defendants in the mainstream courts. The third asked questions regarding potential problems in the sentencing process for Indigenous defendants in the mainstream courts. The fourth considered recent sentencing programs and diversionary options that might impact Indigenous sentencing. The fifth asked magistrates, judges and prosecutors to make suggestions for change in current sentencing practices for Indigenous defendants.

A self-administered survey of 14 questions was mailed to all judges (District and Supreme) and magistrates listed on the Queensland court website in December 2009. In total 85 magistrates, 39 District Court judges and 28 Supreme Court judges were approached and asked to complete the survey. Pre-paid self-addressed envelope was

[16] Permission was also sought to survey prosecutors from Queensland's Office of the Director of Public Prosecutions but this request was declined.

provided to facilitate the return of the survey. The response rate (11.8%) was very low, with only one judge and 17 magistrates responding.

The police prosecutors' survey consisted of ten questions. Surveys were emailed to all police prosecutors (approximate number = 200). Police prosecutors were asked to respond by returning the completed survey via email. As was the case with the survey of magistrates and judges the response rate (16.5%) was low, with a total of 33 prosecutors responding.

Thus, this means that caution needs to be exercised when interpreting the results provided in this chapter.

BACKGROUND CHARACTERISTICS OF RESPONDENTS MAGISTRATES, JUDGES AND POLICE PROSECUTORS

Tables 4.1 and 4.2 summarises the demographic characteristics of the magistrates, judges and police prosecutors who participated in the surveys. Of those magistrates and judges who responded, 61.1% were male, and the majority (77.7%) had more than three years of judicial experience (see Table 4.1). None of the magistrates or judges identified themselves as being from an Indigenous background. The overwhelming majority of survey responses were received from magistrates sitting in the lower courts (only one judge completed the survey).

Table 4.1. Background Characteristics, Magistrates and Judges

Characteristic		N	%
Gender	Male	11	61.1
	Female	7	38.9
Sitting Court	Higher Courts	1	5.6
	Lower Courts	17	94.4
Years of Judicial Experience	Less than 3 years	4	22.2
	3-9 years	8	44.4
	More than 9 years	6	33.3
Indigenous Background	Yes	0	0.00
	No	18	100.0

As shown in Table 4.2 (below), the majority of the police prosecutors who responded were male (63.6%); few (6.3%) identified themselves as Indigenous; and the majority (81.9%) reported having more than three years prosecutorial experience across a range of locations.

Table 4.2. Background Characteristics, Police Prosecutors

Characteristic		N	%
Gender	Male	21	63.6
	Female	12	36.4
Practice Locations	Major Cities	25	75.7
	Regional Towns	24	72.7
	Remote Areas	21	63.6
Years of Prosecutorial Experience	Less than 3 years	6	18.2
	3-9 years	22	66.7
	More than 9 years	5	15.2
Indigenous Background	Yes	2	6.3
	No	31	93.8

AGGRAVATING AND MITIGATING FACTORS IMPACTING INDIGENOUS SENTENCING

Magistrates and judges were asked whether different aggravating and/or mitigating circumstances were seen more frequently during the sentencing of Indigenous versus non-Indigenous defendants. Thirteen (75%) reported that different circumstances are seen in Indigenous cases. Of those reporting different circumstances, the most frequent responses included: alcohol and substance abuse (n=9), family dysfunction and disadvantage (n=7), and low socio-economic status and/or unemployment (n=2).

Police prosecutors were asked to identify the top two aggravating and mitigating factors most frequently submitted by defence counsel at sentencing. Results mirrored those found in the survey of magistrates and judges. Respondents could provide more than one response. The most common mitigating circumstances reported by police prosecutors are: alcohol and substance abuse (60.6% or 20 prosecutors mentioned); family dysfunction and disadvantage (39.3% or 13 reported); and lower socio-economic status and/or unemployment (9% or 3 reported). Of the most frequently submitted aggravating factors, the most common responses were: an extensive criminal history, including breaches of prior court orders (66.6% or 22); alcohol and substance abuse (48.5% or 16); and high levels violent offending (27.3% or 9).

The magistrates and judges reported that Indigenous customary practices were rarely presented as a mitigating circumstance at sentencing. In total, 13 (72.2%) reported that Indigenous customary practices are never submitted as a mitigating factor in defence sentencing submissions. Further, 15 (83.3%) stated that punishment under Indigenous customary practices was never submitted as a mitigating factor. For example, one magistrate commented that:

> *Usually, used to explain conduct rather than to excuse or mitigate the behaviour and can be helpful to understand events rather than leading to lower penalty any great extent. (Magistrate).*

Similarly, twenty (60.6%) police prosecutors also reported that they had never heard a defence submission referencing customary practices, nor heard mention of punishment under Indigenous customary practices, as a possible mitigating factor.

PROBLEMS FACED WHEN SENTENCING INDIGENOUS DEFENDANTS

The magistrates, judges and police prosecutors were asked to indicate whether they viewed a range of factors as problems for determining sentencing decisions, and in turn, whether any of these issues were unique to Indigenous cases. Results suggest that the magistrates and judges are concerned about:

- a lack of community based-sentencing alternatives in some locations (mentioned by 12),
- delivery of community-based sentencing in some locations (mentioned by 12),
- a lack of available court interpreters (mentioned by 11),
- a lack of verified information about the defendants being sentenced (mentioned by 10).

However, responses indicate that these problems are seen as generic and not specific to Indigenous defendants.

Police prosecutors also identified a lack of community based-sentencing alternatives (n=11), appropriate treatment and/or rehabilitation programs (n=12) and verifiable information about defendants (n=12) as being an issue at sentencing. However, unlike the magistrates and judges surveyed, a lack of available court interpreters did not appear to concern police prosecutors (n=1). None of these problems were identified by police respondents as unique to Indigenous defendants. Prosecutors express concern that multiple adjournments were more common in Indigenous cases (n=15), resulting in longer average processing times for Indigenous defendants:

> *It is not uncommon for finalisation of matters to be delayed due to the [Indigenous] defendant failing to appear or simply being late to court. (Police Prosecutor).*

IMPACT OF ALTERATIVE SENTENCING PROGRAMS AND DIVERSIONARY OPTIONS FOR INDIGENOUS DEFENDANTS

Magistrates, judges and police prosecutors were asked whether a range of diversionary and alternative sentencing options impacted positively on the sentencing of Indigenous defendants. Up to 16 magistrates and judges and 20 police prosecutors stated that they were unaware of the impact of some of these programs on Indigenous

people. However, the Murri Court (9 magistrates/judges; 24 police prosecutors), Drug Court (4 magistrates/judges; 9 police prosecutors), and Queensland's Indigenous Alcohol Diversion Program (4 magistrates/judges; 14 police prosecutors) were seen as having had positive outcomes for the sentencing of Indigenous defendants.

Respondents expressed a range of views as to why particular programs impacted positively on the sentencing of Indigenous defendants. Typical responses include:

- the Drug Courts assisted defendants to address the underlying causes of their offending (i.e. drug abuse), and in doing so, provided a viable rehabilitative alternative to imprisonment,
- the sentencing focus of the Murri Court on cultural appropriateness and rehabilitation for Indigenous defendants was viewed as beneficial.

SUGGESTIONS FOR CHANGE IN CURRENT SENTENCING PRACTICES FOR INDIGENOUS DEFENDANTS

Magistrates, judges and police prosecutors were asked to provide suggestions to improve the sentencing process for Indigenous defendants. Five themes were identified from their open-ended responses. These are:

1. More, better resourced and effective community based bail and sentencing options with a rehabilitative focus:

   A significant change and failure had occurred by sentencing options of community based orders disappearing from the available sentencing regime. Community based orders are now non-existent, probation, except by some very limited supervision, mostly telephone supervision. Loss of telephone supervision. (Magistrate).

   More and better resourced community based programs, especially in Cape York (Magistrate).

   There is a distinct lack of bail and sentencing options not only in the communities but also in Brisbane and other cities. (Magistrate).

   More community-based sentencing options in all courts. (Police Prosecutor).

   Further sentencing options available that are appropriate for Indigenous persons and those that fall between the gaps. For example, more suitable community based orders or mandatory rehabilitation or counselling and the services available to provide that rehabilitation bearing in mind that when sentenced to jail most defendants only receive short periods of imprisonment when they are sent, which does not allow for rehabilitation programs. (Police Prosecutor).

   Effective bail conditions to ensure they [Indigenous defendants] remain within the court jurisdiction or maintain contact with the various indigenous support workers/organisations (Police Prosecutor).

2. Establishment of Indigenous specific custodial facilities, probation and community service programs:

An Indigenous custodial facility focusing on country, education, working training and staffed by qualified and non-qualified Indigenous personnel and Indigenous-centric personnel supported by Indigenous mentors may stem the frequency of return to white man's prison. Similarly, probation and community service need to be geared to the Indigenous offender. One size does not fit all (Magistrate).

Equality compared with equity. Sending black and white offenders to the same prisons and probation programs and community service projects might be equality in action but not equity. It is discriminatory not to set up Indigenous centric options. (Magistrate).

Purpose built correctional facilities for ATSIL persons only- which caters to customary needs and allows access to family with focus on drug and alcohol rehabilitation. (Police Prosecutor).

3. Extension and support for the Murri Courts and Queensland's Indigenous Alcohol Diversion Program:

Ongoing funding for Murri Court and rollout of financial commitments to all Murri Courts and development of new courts, roll out of Queensland's Indigenous Alcohol Diversion Program which is terrific. (Magistrate).

Unfortunately Magistrates Courts are not funded for setting up Murri Courts which can provide alternative sentencing for current difficulties revolve around financial and personnel difficulties. Therefore need more funding and judicial officers to put alternative sentencing in place. (Magistrate).

If it is suggested that Murri court is to successfully divert indigenous person away from the mainstream courts, more funding and structure is required. The justice group administering most of the programs for Murri court participants need more funding in order to successfully run programs for the growing number of participants. The courts also require specific legislation, as in drug court, to allow the Magistrate to reward or sanction participates. (Police Prosecutor).

4. Better resourced legal representation:

More funding of lawyers for ATSILS (Police Prosecutor).

Better legal representation (Police Prosecutor).

5. More court interpreters and court liaison officers:

Interpreters are needed in these courts. Court liaison officers or someone with some knowledge may assist. Correlative services have to do their job- glossy brochure policy documents are not enough'. (Magistrate).

Interpreters for defendants in Cape and Gulf communities. Equity for all Indigenous people across state for access to these processes. (Magistrate).

Need Aboriginal and T.S.I. Court Co-ordinators to liaise with the Indigenous Communities and service provides to seek the options. (Magistrate).

CONCLUSION

This chapter summarises the findings of surveys of the magistrates, judges and police prosecutors. The results suggest that there may be some differences in the type of aggravating and mitigating factors presented in Indigenous cases compared to non-Indigenous defendants. In particular and in contrast to non-Indigenous defendants, alcohol and/or substance abuse, family

dysfunction/disadvantage and low socio-economic status were thought more likely to impact the sentencing of Indigenous offenders. This perception may reflect the position of Indigenous people in Australian society. Indigenous Australians are disadvantaged in comparison to non-Indigenous Australians on all social and economic indicators. For example, the lives of Indigenous Australians are more likely to be characterised by poverty, victimisation, drug and alcohol abuse, physical and mental ill health, unemployment, and low educational achievement (Commonwealth of Australia, 2007).

Magistrates, judges and police prosecutors also identified a number of issues as being problematic for sentencing including: a lack of community-based sentencing alternatives, appropriate treatment and/or rehabilitation programs and verifiable information about defendants. However, these issues were not viewed as being specific to Indigenous defendants.

In terms of alternative programs/options, the cultural appropriateness and rehabilitative potential of the Murri Court and the rehabilitation options of the Drug Court and Queensland's Indigenous Alcohol Diversion Program were seen as positive for Indigenous defendants. Not surprisingly, the magistrates, judges and police prosecutors suggested that community-based sentencing and bail options, Murri Courts and Queensland's Indigenous Alcohol Diversion Program should continue to be supported and extended, because these programs improved the sentencing process for Indigenous people. In addition, more court interpreters, Indigenous court liaison officers, and better resourced Indigenous legal services were suggested.

The next chapter summarises the findings of our focus group consultations with members of community justice groups.

Chapter 5: Views Emerging from Project Consultations, Indigenous Community Justice Groups

Indigenous community justice groups are funded by the Department of Justice and Attorney-General to develop strategies (often in consultation with magistrates, police, corrective services personnel and staff from other government and non-government agencies) within their communities for dealing with justice-related issues and to decrease Indigenous contact with the criminal justice system. Community justice groups provide support to Indigenous people involved with the criminal justice system and have a vital role in the sentencing process. It will be recalled from the first chapter that under the *Penalties and Sentences Act 1992* (Qld) when sentencing Indigenous offenders, the court must consider submissions made by community justice group representatives, which may include "cultural considerations" (s.9 (2)). In this chapter, the findings of interviews and focus groups conducted with community justice groups are presented. Similar to the magistrates, judges and prosecutors survey (findings reported in the previous chapter) the purpose of the community justice group consultations was to provide greater context around the sentencing of Indigenous offenders, in this case from the experiences of Indigenous people working within the court system.

DESCRIPTION OF CONSULTATION AND INTERVIEW PROCESS

A list of community justice groups was provided by the Department of Justice and Attorney-General containing contact details for 43 groups. All community justice groups were contacted in writing to provide them with background information regarding: the research and to invite interested groups to participate in an interview or focus group. Interviews or focus groups were conducted with eight[17] of the 43 community justice groups with a total of 21 individuals participating. Due to the small number of community justice groups consulted caution should therefore be exercised when interpreting the views provided in this chapter.

The content of the questions asked during the interviews or focus groups with community justice groups are similar to those posed in the magistrates, judges and police prosecutors' survey (see pervious

[17] It is likely that the low response rate was due to time restraints on the part of community justice group members who as volunteers would have needed to fit interviews or focus groups in during lunch breaks, at their paid workplaces, after hours, or at court (being a day when they take time off work to be able to provide sentencing reports to the court).

chapter). More specifically the interview or focus group schedule of questions consisted of five sections:

1. background information about the participants,
2. differences observed in the sentencing of Indigenous versus non-Indigenous offenders,
3. potential problems in the sentencing process for Indigenous defendants,
4. the impact of community justice groups, Murri Courts, court diversion programs and other sentencing processes such as JP Magistrates Court on the sentencing of Indigenous offenders,
5. suggestions for change in current sentencing practices for Indigenous defendants.

BACKGROUND INFORMATION FOR COMMUNITY JUSTICE GROUP PARTICIPANTS

The participants included community justice group coordinators (paid positions), other community justice group employees funded under separate programs (paid positions), and community justice group members (unpaid positions). The experience held by the participants working within the community justice groups ranged from a few months to eight years. The participants reflected a range of ages and both sexes. The participants were based in remote and regional areas. No members from urban community justice groups were available for the consultations.

DIFFERENCES OBSERVED IN THE SENTENCING OF INDIGENOUS VERSUS NON-INDIGENOUS DEFENDANTS

Not all community justice groups were able to comment on any real or perceived differences between the sentencing of Indigenous and non-Indigenous offenders because they either had very few non-Indigenous people go through the court in their area or because they attended court only for the purposes of providing a sentencing report for an Indigenous offender and did not otherwise attend. However, for those that could comment, overall in their experiences, there were few significant differences in the sentencing of Indigenous versus non-Indigenous offenders. Tentatively it would seem that from the experiences of community justice groups consulted for this research, Indigenous disparity in sentencing was not considered to be an issue.

Rather than differences between Indigenous and non-Indigenous sentencing being an issue, a major concern was the disparity between Indigenous people from different communities. For example, one group stated that, based on statistics provided to them by the Department of Justice and Attorney-General, the rates of 'no conviction recorded' for Alcohol Management Plan offences varied alarmingly between communities. The reasons for this disparity were unclear or unknown to the group.

While not necessarily acknowledged in the context of disparity, one community justice group stated that in sentencing, "if the magistrate was having a 'bad day' everyone would go to prison."

PROBLEMS IN THE SENTENCING PROCESS FOR INDIGENOUS DEFENDANTS

Similar to magistrates, judges and police prosecutors (see pervious chapter), community justice groups expressed concern about: 1) a lack of community based sentencing alternatives, diversionary options and rehabilitation programs, 2) barriers in language, communication and understanding, in addition to a lack of consideration of traditional law and culture in more urban areas. Furthermore, community justice groups were concerned about the accumulation of extensive criminal histories for minor offences by Indigenous people as a result of police overcharging.

Lack of community based sentencing alternatives, diversionary options and rehabilitation programs

An issue repeated by every community justice group was the lack of alcohol and drug rehabilitation support services available to the court for referral and/or sentencing. One group stated that a magistrate commented that if they had more programs they would not send offenders to prison. In their experiences alcohol was a significant factor in the vast majority of offences committed by Indigenous people. Nevertheless, it was observed that rather than extending or continuing existing programs, alcohol and drug rehabilitation programs were being closed down. Further, community justice groups noted that, where programs are available they are usually based in another town or community and "offenders do not want to go to another community so far from their own communities." Magistrates send offenders to programs in the nearest regional centre but offenders do not want to leave their families or in some cases while they are away they will lose their accommodation and so when they return they will be homeless.

The community justice groups expressed additional concern that offenders sentenced to prison are often unable to access counselling or work programs unless serving terms of 12 months or more. For example, one group noted that "while in prison for short periods offenders essentially do nothing". Given that they cannot access counselling or work programs in prison when serving shorter prison terms, it was felt the offenders' time would be better served doing community service, counselling, community based-projects and programs. These kinds of sentencing options, it was argued, would better facilitate rehabilitation, maintain interaction in the community and "teach them respect and skills." However, one community justice group stated that offenders 'hate' community service because it is 'shameful'.

Several groups also expressed the need for half-way houses for diversion particularly in relation to domestic violence and at night when individuals are intoxicated. Outstations close to their communities were also suggested. Overall, more community based rehabilitative sentencing options were advocated. The community justice groups expressed the desire and need to work with providers of community based sentencing options to assist with practical matters such as "accommodation, employment, training, finances and the like", all factors which can affect the likelihood of persons reoffending. They argued that a "more holistic approach" was needed to, "deal with offending and reoffending."

Language, communication, understanding, traditional law and culture

Community justice groups in all locations identified problems with language, communication and understanding for Indigenous defendants in the court. Great concern was expressed about the fact that interpreters are currently not used as a matter of course for Indigenous offenders when they needed to be. Community justice groups were concerned that due to language barriers Indigenous defendants sometimes misunderstood solicitors' advice in pleading guilty, or failed to fully comprehend the sentence being given. However, it was pointed out that, "a 'good' magistrate will make sure the person understands what has transpired in court." It would therefore seem that problems in this regard may come down to differences between individual magistrates.

The community justice groups stated that customary law considerations were taken into account by the court in the locations where they operated i.e. non-urban locations. They stated that in their opinion this might not be the case in urban areas. However, the community justice groups thought this was likely the result of the diversity of Indigenous peoples in urban locations.

Criminal history accumulation

All of the community justice groups expressed concern with the fact that Indigenous offenders were being sentenced to imprisonment for somewhat trivial offences because they were being repeatedly charged by police (which in their experience was somewhat unnecessary) with what were considered to be minor offences. The groups identified that a person will initially be charged by police with a minor offence (such as public nuisance) for which they will receive a fine. Over period of time they may be charged with public nuisance a number of times. While this is a minor offence in the context of criminal justice system such charging practices have a cumulative effect. One group stated that in their experience "after the fourth public nuisance offence, the offender would usually go to prison". Then every "public nuisance offence thereafter would result in higher and higher penalties and

increasing lengths of imprisonment." Consequently, a person may only ever commit public nuisance offences but the cumulative effect of the criminal history is such that an offender may go to prison for "swearing in public". In the view of the community justice groups, the punishment in such instances does "not fit the crime." One group stated, that "it is these minor offences that offenders primarily go to prison for". So, rather than "offenders going to prison for serious offences such as sexual assault or grievous bodily harm", offenders in their community are going to prison for what are perceived as minor offences.

One community justice group further articulated that in "our way" (the way of their community and in accordance with their cultural practices) once you complete the punishment for your wrongdoing you "get a clean slate." The process of wrongdoing accumulating over time, as is the case in European based systems of justice, means that people can never be free of their past behaviour and they will continue to be punished for it. Another group commented that as a result of going in and out of prison for short periods of time for minor offences the prison becomes a "home away from home".

IMPACT OF ALTERNATIVE SENTENCING PROGRAMS AND DIVERSIONARY OPTIONS FOR INDIGENOUS DEFENDANTS

Community justice groups were asked whether a range of diversionary or alternative sentencing options impacted positively on the sentencing of Indigenous defendants. The general consensus was that: 1) community justice groups positively impacted the sentencing of Indigenous offenders. However, there were concerns that community justice group input into sentencing was limited and would become even more limited in the future because of resourcing issues, 2) the Queensland Indigenous Alcohol Diversion Program has positive impacts on sentencing for Indigenous defendants.

Community justice groups

All the community justice groups stated that magistrates and judges considered their sentencing reports and took into account the submissions made in them.[18] Overall, it was felt that the impact of their submissions were positive for a number of reasons.

First, it was argued that community justice group members were familiar with defendants, often having known them from birth and therefore able to tell the court about their individual circumstances

[18] It is interesting that in some cases where a defendant is a repeat offender who has previously been supported and counselled by the community justice groups or the offending act is one viewed by the community justice groups as totally unacceptable (such as spitting on police), the community justice groups make an active choice not to provide a sentencing report to the court.

within the community. They believed that this familiarity improved the sentencing process for Indigenous defendants because more detail information on which sentencing decisions could be based was available to magistrates and judges. Potentially, this could make sentencing a more equitable process.

Second, community justice groups operate their own sentencing programs (e.g. counselling with Elders and mediation) which they recommend to magistrates and judges as viable sentencing options. These Indigenous specific sentencing programs are likely to have positive impacts on sentencing for Indigenous defendants. Further, it was noted that magistrates will put offenders on a good behaviour bond and direct them to community justice groups. The community justice group will in turn direct them to Alcohol, Tobacco and Other Drugs (ATOD) workers, counselling, anger management, courses, education and mental health services if need be. Again, this may lead to improved outcomes for Indigenous people.

Third, community justice groups provide a contact point within the community for offenders who cannot make it to court due to unforseen circumstances and for reporting. The community justice groups convey this information to the court which in many cases prevents the issuing of a warrant for failure to appear, in those situations beyond the offender's control. This may reduce the likelihood of imprisonment for Indigenous offenders.

Fourth, in cases where Indigenous defendants experience barriers in language, communication and understanding in the court, community justice group members will act as interpreters. This helps to ensure that offenders are clear about the situation whether it be advice about the likely sentence, the nature of the court orders or other processes within court. This may improve the process of sentencing for Indigenous defendants.

Finally, one of the community justice groups stated that they often do the 'ground work' with Aboriginal and Torres Strait Islander Legal Services in preparing people for court, e.g. preparing information around the QP9 (police file provided to defence) for court. This may be outside the scope of the community justice groups' functions but appears to be in response to the need to ensure fair and adequate preparation for court.

While community justice group input into sentencing was considered positive there were few guarantees that Indigenous defendants would receive it. Limited resources and subsequent time constraints meant that community justice groups were not always able to provide sentencing submissions. The community justice groups that were spoken to felt that while they had been established to provide input

into the sentencing process they had not been adequately funded to properly and meaningfully carry out this task.

For example, due to resource and time constraints, community justice groups have very little input into District Court sentencing. Most parts of Queensland do not have regular District Court sittings. As a result, offenders are often required to appear in District Courts for sentencing in regional centres outside of their community. Limited access to transport and the time it would take to travel to higher court locations makes it difficult for members of community justice groups. In addition, community justice groups seem unsure of the court dates for offenders in the higher courts. This means that for the most part, community justice groups are having limited input into, and therefore impact on, higher court sentencing. The exception is when individual judges contact the community justice groups for a written report.

It was also reported that while the groups spoken to did not have a Murri Court in their locale, other groups in areas with a Murri Court only had time to participate in this court and not in the mainstream courts. Consequently, only those Indigenous offenders sentenced in the Murri Court could obtain the benefit of the sentencing report of the community justice group. This meant that in areas with a Murri Court, the majority of Indigenous offenders (i.e. sentenced in the mainstream courts) were not being provided with a sentencing submission from a community justice group. This is of great concern but is once again a function of limited resourcing.

A further significant difficulty for community justice group sentencing submissions, in terms of resourcing, relates to the area covered by the group and the number of courthouses within that area. Some community justice groups service a small area with many linnets while others service a larger area with more clients. It is unclear though whether these types of factors are taken into account when resourcing community justice groups in their task of providing sentencing reports to the courts.

Thus, there was a general overall feeling of concern with regard to the resourcing of community justice groups. Further fear was expressed about the future of community justice groups. A number expressed worry that their funding was due to be cut this year and were concerned about the consequences of this reduced funding on sentencing in the coming financial year.

Queensland Indigenous Alcohol Diversion Program

One group identified that it would like to see the Queensland Indigenous Alcohol Diversion Program in its community. Generally, and as noted previously, community justice groups were of the view that there needs to be more drug and alcohol facilities in the

community. As noted by one participant, "each community should have its own alcohol and drug support service" because "Murris always come back to their own community."

JP Magistrates Court

No extensive comments were made about the impact of processes such as JP Magistrates Court on sentencing. However, one community justice group noted that in the JP Magistrates Court people, "understand what is being said….This is because the courts are run in the language of the community."

SUGGESTIONS FOR CHANGE IN CURRENT SENTENCING PRACTICES FOR INDIGENOUS DEFENDANTS

From the consultations with community justice groups the following suggestions for improving the sentencing process for Indigenous defendants can be surmised:

1) more alcohol and drug rehabilitation support services available to the court for referral and as part of community based sentencing orders in the communities where Indigenous offenders live,
2) the need for more and better resourced rehabilitative sentencing and diversionary options,
3) better and continued resourcing for community justice groups to ensure their input into sentencing (as per the *Penalties and Sentences Act 1992* (Qld)) in more courts and at all court levels (i.e. higher as well as lower courts),
4) training to help judicial officers comprehend better issues pertaining to language, understanding, communication and culture; the main issue of concern was around language barriers and the community justice groups wanted to see training that would help judges and magistrates to better identify when a court interpreter was needed,
5) support and potential extension of Queensland's Indigenous Alcohol Diversion Program,
6) possible extension of the JP Magistrates Court.

Many of the above suggestions are similar to those identified by the magistrates, judges and prosecutors in Chapter 4.

CONCLUSION

This chapter summarises the findings from interviews and focus groups with community justice groups. The outcomes suggest that in the experience of these groups, there were few significant differences in sentencing between Indigenous and non-Indigenous defendants. In other words, sentencing disparity was not perceived as a problem for the community justice groups that we consulted.

Community justice groups did however identify a number of issues as being problematic for Indigenous people at sentencing including: 1) a lack of community based sentencing alternatives, diversionary and rehabilitation programs, 2) barriers in language, communication and understanding, 3) lack of consideration of traditional law and culture in more urban areas, 4) accumulation of extensive criminal histories by Indigenous people for minor offences because of police overcharging.

The community justice groups made a number of suggestions regarding community based sentencing alternatives, diversionary and rehabilitation programs (e.g. half-way houses, outstations, drug and alcohol programs). Queensland's Indigenous Alcohol Diversion Program, JP Magistrates Court and the community justice groups themselves were also seen as being positive for Indigenous defendants at sentencing. The continued, better resourcing and possible extension of these latter three initiatives were advocated by the community justice groups we consulted. Training for magistrates regarding Indigenous issues such as barriers to language, understanding, communication and culture was also suggested.

The next chapter will summarise the key findings from our research in terms of the project questions and provide a number of recommendations for consideration.

Chapter 6: Discussion and Recommendations

This report presents the findings of a comprehensive study of Indigenous sentencing in Queensland's courts. The project's analyses rely on a range of data sources, including administrative databases, judicial sentencing remarks, and surveys of magistrates, judges and police prosecutors, qualitative interviews and focus groups with members of community justice groups. During the process of negotiating access to data and refining the scope of the project we also had informal discussions with key stakeholders: these include judicial officers, community justice group coordinators, as well as staff in the Magistrates Court Branch, Department of Justice and the Attorney-General, Department of Public Prosecutions, Department of Communities, and the Queensland Police Service. While this project has encountered challenges in empirically evaluating the extent of any disparities in sentencing between Indigenous and non-Indigenous offenders, it does provide the most rigorous analyses possible within these data constraints. Thus, this project has provided a unique opportunity to improve our understanding of the sentencing of Indigenous offenders (compared to non-Indigenous offenders) in Queensland's courts.

This chapter describes the key findings in terms of the project questions that have emerged from the research, summarises difficulties encountered in accessing data, and then identifies a number of recommendations for consideration by the Queensland Government.

DO SENTENCING OUTCOMES DIFFER BETWEEN INDIGENOUS AND NON-INDIGENOUS OFFENDERS? IS SENTENCING DISPARITY EVIDENT ACROSS THE SPECTRUM OF SENTENCING OUTCOMES?

The results of our quantitative analyses (reported in Chapters 2 and 3) indicate that there are few significant differences in sentencing outcomes between Indigenous and non-Indigenous offenders in the higher courts (youth and adults) and the lower courts (adults only). The finding of few differences between the sentencing outcomes for Indigenous and non-Indigenous offenders receives some support from the focus group interviews with community justice group members (see Chapter 5). Although there was understandably limited exposure to the sentencing hearings of non-Indigenous offenders, they did not see substantial differences between Indigenous and non-Indigenous sentencing outcomes, at least in the lower courts in remote and regional locations.

In general, across the statistical analyses of the higher adult courts, adult Magistrates Court, and the higher children's court samples (i.e.

Childrens Court of Queensland (District Court), Supreme Court), most baseline differences in sentencing outcomes for Indigenous and non-Indigenous offenders dissipated when adjusted for demographic, social, case and processing factors. However, some differences across the range of sentencing outcomes were found. While the initial gap in the likelihood of receiving these sentencing outcomes between Indigenous and non-Indigenous offenders reduced, some difference remained.

In our samples, after accounting for other factors, Indigenous offenders were:

- less likely to receive other penalty orders (bonds without supervision and community service orders) in the adult higher courts,
- more likely to receive a suspended sentence of detention in the children's higher courts (i.e. Childrens Court of Queensland (District Court), Supreme Court),
- more likely to receive a sentence of imprisonment, and more likely to receive a monetary order, but less likely to have an order of disqualification of a driver's licence in the adult Magistrates Court.

In terms of sentence length/penalty amount, few significant differences remained after adjusting for other factors. However, these remaining differences suggested direct positive discrimination:

- in the adult Magistrates Court, Indigenous offenders received lower amounts for monetary orders,
- in the adult higher courts, Indigenous offenders received shorter terms of imprisonment, and shorter terms of suspended imprisonment terms.

There were no significant adjusted differences between Indigenous and non-Indigenous young offenders for sentence length/penalty amount.

There are two important caveats on these findings. First, due to limitations in the existing data, we were unable to obtain information about the context of the commission of the offence and any mitigating or aggravating circumstances for cases heard in the Magistrates Court. Further, even where we were able to collect information on a range of mitigating and aggravating factors in the higher courts, these measures are limited and incomplete. As a result, the above differences between Indigenous and non-Indigenous defendants sentencing outcomes may by explained by unmeasured or more precise measures of legal and social factors. Second, the presence of differences by Indigenous status may not mean harsher sentencing outcomes, or negative discrimination, for Indigenous offenders. For instance, Indigenous youth were more likely to receive a suspended

sentence of detention. When compared to the reporting requirements of other orders, it is not clear that, in practice, suspended sentences of detention are necessarily more restrictive, and thus harsher, for young offenders.

In short, the disappearance or reduction of initial differences in sentencing outcomes shows support for the differential involvement hypothesis: that is, Indigenous offenders come to the courts with different types of offences, and different criminal and social histories. Nonetheless, these findings also suggest that there may be some evidence of disparity, particularly for the Magistrates Court.

WHAT FACTORS INFLUENCE SENTENCING OUTCOMES? DO THESE FACTORS DIFFER FOR INDIGENOUS AND NON-INDIGENOUS OFFENDERS?

Overall, our statistical analyses (in Chapters 2 and 3) showed that, across most outcomes in the adult and youth samples, the most consistent significant predictors of sentencing were:

- seriousness of the current principal offence,
- prior criminal history,
- being on remand,
- presence of a final plea of guilty,
- being convicted of multiple counts.

These results are in line with prior research on sentencing disparities (see Chapter 1).

Our consultations with community justice groups evidenced a particular concern with the cumulative effect of prior criminal history for Indigenous offenders: they made these remarks in the context of repeated police charging for minor offences (such as public nuisance) resulting in the accumulation of a prior history that escalates the sentencing penalty even for minor offences.

The impact of offender's social histories and context of offence could only be assessed in the higher court samples (adult and youth). However, there are serious limitations on our measures, as they were coded from transcripts of judicial sentencing remarks. Consequently, we only know of their existence in cases where the judge was moved to comment on these circumstances. Tentatively, the results suggest that the key social predictors include:

- age (both youth and adult higher court samples),
- being female (adult higher court sample),

- commission of an offence in a private place (adult higher court sample),
- presence of childcare responsibilities (adult higher court sample).[19]

Overall, results suggest that there were few significant differences in the weighting of different sentencing factors (i.e. interactional effects) by Indigenous status, regardless of court type. Although our analyses are limited due to the small numbers across some categories, differential impacts on sentencing decisions of offender, case and processing factors were found, particularly in the adult Magistrates Court sample. These differential weightings by Indigenous status were primarily around legal factors.

We were unable to directly test for the impact of other types of processing (e.g. legal representation, court interpreters, Indigenous sentencing initiatives such as Murri Courts and the involvement of elders and community justice groups) and correctional factors (e.g. available sentencing options, length of time served on remand) in our statistical models, as this information was not easily available. However, our consultations with judicial officers, police prosecutors, and community justice groups suggested that there could be three other types of processing and correctional factors of influence to the sentencing decision (see Chapters 4 and 5). We note, however, that these views are not based on representative samples, as response rates to our requests for participation in the consultation process were low. Tentatively, the results of the surveys of judicial officers and police prosecutors, and the focus group interviews with community justice group members indicate that:

1. Alternative sentencing models and programs that address barriers to communication and language may have a positive impact on the process of sentencing Indigenous offenders. These programs include Murri Courts, J.P. Magistrates Court, and community justice groups,

2. Pre-sentencing diversionary programs (such as the Queensland Indigenous Alcohol Diversion Program) are an important way in which evidence of rehabilitation can enter the sentencing process,

3. The lack of community-based sentencing options (including the difficulties in delivering existing programs in remote locations) was a problem in determining sentencing decisions. Although judicial officers and police prosecutors did not perceive this problem as unique to Indigenous defendants, it does

[19] The direction of the influence of this variable was unexpected: the presence of childcare responsibilities increased the likelihood of a sentence of imprisonment. We discuss reasons for this result in Chapter 2.

differentially impact Indigenous defendants, as they are more likely to reside in remote or outer regional locations.

In sum, there were a few differences in the weighting of sentencing factors between Indigenous and non-Indigenous offenders, most notably around legal factors. Communication barriers and lack of community-based sentencing options may differentially impact the sentencing of Indigenous offenders.

ARE THERE DIFFERENT VIEWS ABOUT WHAT CONSTITUTES AGGRAVATING AND MITIGATING FACTORS IN SENTENCING INDIGENOUS OFFENDERS?

Our consultations with key stakeholders did not reveal any evidence that there were different views about what constitutes aggravating and mitigating factors for Indigenous offenders. The results of our survey of judicial officers and police prosecutors did show that there are differences in the types of circumstances that are typically present in Indigenous cases compared non-Indigenous cases. Both judicial officers and police prosecutors agreed that circumstances of substance abuse, family dysfunction, and low socio-economic status were more frequently seen in Indigenous cases, than non-Indigenous cases. This perception may reflect the social and economic position of Indigenous people in Australia.

DATA ACCESS DIFFICULTIES

Although we have discussed a number of data issues that restrict the types of analyses and conclusions that can be drawn about sentencing disparity between Indigenous and non-Indigenous offenders, we can summarise the difficulties encountered into four main groups:

First, *lack of a unique identifier for offenders*. The key administrative data source (the database held by the Department of Justice and Attorney-General) is not structured in such a way to allow the unique identification of individuals. Further, there was no unique way to match information across databases: sometimes matching was done by case file number, sometimes by local file number, and other times by name and birth date. There were also issues with file numbers not matching across some databases. The lack of a unique identifier across sources of sentencing information had three key consequences for our project: (1) offender-level analyses could not be undertaken; (2) the amount of time spent in identification, negotiation, and cleaning of data was substantially increased; (3) potential for errors and missing data also increased.

Second, *no single source of information*. To obtain as much information as possible on offenders' cases at sentencing, we had to access

multiple databases, with different definitions and protocols. There was no single source of data that contained the information required to take account of the factors that influence the sentencing decision. In addition to the four sources of data used in the reported analyses, we also explored the possibilities of at least four other data sources, including (1) databases managed by the Department of Communities (young offenders); (2) case files held by the Department of Public Prosecutions; (3) specialist and innovative programs database maintained by the Department of Justice and Attorney-General (information on alternative programs, such as Murri Court); (4) audio recordings of sentencing hearings in the Magistrates Court. For a range of reasons, use of these other sources were not feasible within the constraints of this project. For instance, it was not clear to what extent information in the Department of Communities' database was regularly and routinely presented to judges in the course of sentencing young offenders. In other cases, the time and cost of extracting and/or manually coding information made their use impractical. However, the result was at least 12 to 18 months of negotiations to access data. Further, some data sources were accessed for one type of information (e.g. criminal history only), making the process more complicated than necessary. The irony is that two of the data sources are based on extracts of information from the administrative tracking database of the courts, a database from which we also obtained data extracts separately. In part, this situation occurred due to resources required to extract, but also differences in opinion about meaning of extracted data in that form.

Third, *unavailability of key information*. We were unable to determine the presence of possible mitigating and aggravating factors for all offenders' cases. Even after accessing multiple data sources, some information about factors known to influence sentencing could not be determined for our cases, especially for cases sentenced in the Magistrates Court. Moreover, our measures of offenders' social histories and the context of their current offending were coded from judicial sentencing remarks in the higher courts. Thus, these measures are not only rough, but also missing in large numbers of cases. Overall, there was great variation in the amount of detail provided in judicial sentencing remarks (which also meant that qualitative analyses of the remarks were not justified). Consequently, our analyses are restricted in what they can say about the impact of mitigating and aggravating circumstances on sentencing outcomes.

Fourth, *required resources to extract certain information*. Some sources of data (e.g. audio recordings) were impractical to access due to the levels of departmental staff time and resources that would need to be devoted to the process. For the data sources accessed, there was a significant commitment of time from relevant departmental staff to

generate the code and extract data.[20] Considerable time was also spent manually coding information for our analyses. The result is that the analyses produced for this project cannot be feasibly conducted as part of a regular process of monitoring outcomes of Indigenous offenders processed before Queensland's courts.

RECOMMENDATIONS

Overall, the project's results suggest that Indigenous sentencing disparities at least in the direction of negative discrimination are not widespread in higher adult and children's (i.e. Childrens Court of Queensland (District Court), Supreme Court), and lower adult Queensland courts. However, the finding of some evidence of difference (even within the limitations of our data and analyses) indicates that sentencing needs to remain on the Indigenous criminal justice policy agenda. Indeed, the problems encountered in accessing data and measuring key factors mean that Indigenous status may be impacting sentencing in ways that we were unable to identify.

Our recommendations can be seen as addressing four broad issues relating to the development of future policy and research for enhancing the experiences and outcomes for Indigenous defendants at sentencing. These are:

1. enhancing the use of existing data,
2. improving monitoring and extending research,
3. improving access to existing court programs and sentencing options in addition to developing new Indigenous specific criminal justice programs,
4. reviewing training of judicial officers and prosecutors.

Enhancing the use of existing data

There are two key areas that need to be addressed for existing databases to be used routinely for the development of policy and the evaluation of programs. We would like to stress the importance of data accessibility and quality: evidence-based policy and programs require good and accessible data. The lack of data to disentangle some key relationships has limited the conclusions that we are able to draw about Indigenous sentencing disparity, and thus, identify more specific policy-based recommendations.

First, many of the difficulties in accessing data were due to the lack of a unique offender identifier across databases. We understand that an integrated criminal justice database (Integrated Justice Information

[20] We would like to sincerely acknowledge the assistance of the different departments and their staff in helping us negotiate data possibilities, and for the time and resources that they committed to processing our data requests.

Strategy) has been under discussion for a number of years. Our experience with extracting and working with administrative data for this project highlights the importance of accessible and useable data on offenders and their cases. We would strongly recommend that the issue of an integrated database, or at least the creation and use of a unique offender identifier, across the criminal justice agencies is made a priority.

We note that for young offenders, the Department of Communities' databases have a client identifier. However, it is internal to the Department, and not used in court administrative data.

There are successful models of integrated databases currently being used in other Australian jurisdictions (such as New South Wales, South Australia, and Western Australia). Our experience in studying sentencing disparities between Indigenous and non-Indigenous offenders in these jurisdictions has been that data extracts have been quicker and less complicated by issues about data definitions.

Recommendation 1: The Queensland Government should prioritise and facilitate the development of an integrated criminal justice database, which should include at a minimum an offender-level unique identifier.

Second, in order to provide a reasonable assessment of sentencing disparity between Indigenous and non-Indigenous offenders, we had to access multiple databases for crucial information. For some information, such as prior criminal history as well as social history information, this was manually coded.

We recognise that it may not be possible to routinely collect information on all factors known to influence sentencing (especially around social histories of offenders), unless pre-sentencing reports were regularly requested and used by judges.[21] However, without information on at least criminal history and court processing factors, any analyses of administrative data cannot be used to assess sentencing disparity, or other policy questions relating to the sentencing process.

[21] From informal discussions with stakeholders, we understand the pre-sentencing reports are rarely requested in adult criminal matters.

<u>Recommendation 2:</u> Key factors influencing sentencing outcomes, such as prior criminal history, remand history, and use of alternative programs, need to be easily extracted from administrative databases.

Improving monitoring and extending research

Improving the monitoring of, and extending research on, sentencing disparities is an important strategy for ensuring and maintaining just outcomes for Indigenous offenders. The ability of government departments to regularly monitor the position of Indigenous offenders within the courts depends to a large degree on addressing the data issues raised in this report (see recommendations 1 and 2). The Department of Justice and Attorney-General maintains extensive databases on offenders' cases and their outcomes, but its utility for guiding policy and programs is limited. It is potentially an important source of information that is under-used, due in part to the data difficulties already discussed. However, if at a minimum, the databases were designed to capture the key critical legal factors on offenders' cases,[22] some routine monitoring of sentencing trends for Indigenous offenders could be conducted.

We stress the importance of regular monitoring in light of our finding that there may be some disparity occurring in the Magistrates Court, as well as the continuing over-representation of Indigenous offenders in the criminal justice system, especially incarceration.

<u>Recommendation 3:</u> Regular monitoring of trends and variations in sentencing outcomes for Indigenous and non-Indigenous offenders should be conducted.

Further, the difficulties of delivering community-based orders may be a key problem that differentially impacts upon Indigenous offenders (due to the geographical distribution of their residential locations). However, due to difficulties accessing quality data for this project, this could not be fully explored in the statistical sentencing models.

[22] From prior research, we know that these legal factors, such as time on remand and prior criminal history, are some of the most consistent and strong predictors of sentencing outcomes (along with current offence seriousness and guilty plea).

<u>Recommendation 4:</u> Examining questions of regional variation in sentencing outcomes for Indigenous and non-Indigenous offenders should be a future research priority.

Future examinations of Indigenous sentencing disparity should also include Indigenous offenders' experiences of the sentencing process, and what they perceive as their needs and difficulties. This dimension was outside the scope of this project, has been largely ignored in local research, and is absent from the evidence-base for policy and program development. However, international research shows that if groups feel they have been treated unfairly by the courts, their confidence in the criminal justice system may be seriously impaired and their commitment to it weakened. Shute, Hood and Seemungal's (2005) British study showed that perceptions of the court process and confidence in the courts varied between different ethnic groups. We recommend that further research is needed to explore Indigenous experiences of the sentencing process. This type of research would also provide valuable empirical evidence of the types of programs and interventions that, from the point of view of Indigenous offenders, might better address their needs.

<u>Recommendation 5:</u> Examining Indigenous offenders' experiences of the sentencing process should be a future research priority.

Improving access to existing court programs and sentencing options in addition to developing new Indigenous specific criminal justice programs

Our consultations with stakeholders showed clear and strong support for existing programs that assisted Indigenous offenders in better understanding the court process, their role in the process, and the outcomes of their cases. These programs also ensure that better quality information might be available to judicial officers. Indeed, there was concern, especially among community justice group members, that due to resourcing constraints many Indigenous offenders did not have access to these types of programs. As part of strengthening these types of programs, we recommend that these programs be reviewed to determine how best they can be resourced and supported. We understand that a review of the J.P Magistrates Court is currently in progress, a review of community justice groups has gone out to tender, the Murri Court has been evaluated and research is currently being undertaken on Indigenous language barriers in the court (see Lauchs, 2010).

<u>Recommendation 6:</u> Further resources should be provided to existing programs that address the barriers experienced by Indigenous offenders in the court process itself (e.g. court interpreters, Murri Court, JP Magistrates Court, community justice groups). Before doing this the results of current program reviews should be considered.

Although current analyses of the administrative data did not suggest large-scale sentencing disparity between Indigenous and non-Indigenous offenders, the continuing over-representation in custodial populations remains a particular concern. The statistical analyses did suggest that a substantial part of the initial differences in sentencing outcomes between Indigenous and non-Indigenous offenders was due to higher current offence seriousness, more extensive criminal histories, and differences in social histories. These findings, combined with key stakeholders' perceptions of the key differences in circumstances of Indigenous and non-Indigenous cases, points to the need for criminal justice interventions and programs that target these differential risks. Consultations with key stakeholders provided some suggestions about the nature of these programs, such as: the extension of the Queensland Indigenous Alcohol Diversion Program and other court diversion programs that address criminogenic risk factors (such as substance abuse), more effective bail programs that help ensure that Indigenous offenders maintain contact with Indigenous support agencies and the establishment of Indigenous specific custodial facilities, probation and community service programs.

<u>Recommendation 7:</u> More programs targeted at the unique needs of Indigenous offenders should be developed in consultation with Indigenous communities.

A key issue raised in the survey of judges and magistrates and consultations with community justice groups was that there may be a lack of access to community-based sanctions with a rehabilitative component in certain locations, due to difficulties in providing viable supervisory arrangements as well as limited available rehabilitative facilities (e.g. substance abuse programs). In other words, judges and magistrates are aware of the problems of such community orders in remote and regional locations, thus limiting their use.

<u>Recommendation 8:</u> Strategies to improve access to viable community-based orders with a rehabilitative component should be developed. These strategies should be developed in consultation with Indigenous communities.

Reviewing training of judicial officers and prosecutors in cross-cultural awareness

Community justice group consultations indicated that language barriers continue to disadvantage Indigenous defendants. There was great concern about the fact that interpreters were not being used as a matter of course because judicial officers found it difficult to ascertain when a court interpreter was needed. 'Breaking down' language barriers is critical for ensuring that appropriate information is provided to judicial officers and the court system remains fair. Thus, we recommend that the relevant departments consider a review of current training programs around Indigenous language and culture, especially looking at the modes of training delivery given the workload commitments of judicial officers and prosecutors. For example, we understand that there has recently been a review of the Aboriginal English in the Courts Handbook which found that District Court judges, magistrates, prosecutors, legal aid and court registry staff: "recognised the need for awareness of Aboriginal English but disliked the Handbook as the vehicle for education" and therefore rarely if ever referred to it. It was instead suggested that better educational outcomes might be achieved via the use of video and/or online training (Lauchs, 2010).

<u>Recommendation 9:</u> Existing training for judicial officers and prosecutors on cross-cultural awareness particularly language barriers should be reviewed and where necessary more appropriate training techniques should be implemented.

CONCLUSION

This project examined sentencing disparities between Indigenous offenders and non-Indigenous offenders in Queensland's courts. This research was undertaken in response to the priorities set out in the Indigenous Criminal Justice Research Agenda. Through an assessment of the relevant literature, statistical analyses of administrative data and interviews and surveys with key stakeholders, the project investigated four key questions:

- do sentencing outcomes for Indigenous youth and adult offenders differ from those for non-Indigenous youth and adult offenders?
- is sentencing disparity evident across the spectrum of sentencing outcomes?
- what individual, social, court process and correctional factors influence sentencing outcomes, and do these factors differ for Indigenous and non-Indigenous offenders?
- are there different views about what constitutes aggravating and mitigating factors in sentencing Indigenous offenders?

Overall, based on both the quantitative and qualitative analyses, we found that there was little evidence of sentencing disparity between Indigenous and non-Indigenous offenders. However, there were significant data quality and access issues that mean this conclusion is made cautiously, and further research is required. While any disparity appears to be small, the research does identify some areas of concern in the sentencing of offenders. The recommendations made above provide the Queensland Government with some options for enhancing the sentencing experiences of Indigenous offenders.

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Appendix A: Description of Data and Variables Used in the Statistical Analyses

This appendix outlines the data sources and variables used in our quantitative analyses of sentencing data reported in Chapters 2 and 3.

SOURCES OF DATA

The key source of quantitative data for the analyses of Indigenous sentencing disparities is maintained by the Department of Justice and the Attorney-General ("the main database"). This database is based on regular extracts of data from the administrative tracking database used by the Queensland's courts.

Other sources of data accessed for the analyses include:

- Queensland Courts' administrative tracking database for information not easily extracted from the Justice and the Attorney-General data,
- Queensland Police Service criminal history data (adult offenders only),
- transcripts of sentencing remarks delivered by judges (adult higher courts and children's higher courts only).

DESCRIPTION OF VARIABLES USED IN THE ANALYSES OF THE ADMINISTRATIVE DATA

As there may be multiple charges and sentencing outcomes in each case, our analyses focus on the offence with the most serious sentencing outcome (ranked from imprisonment, supervised order, unsupervised community sanction, disqualification of licence, monetary order, to no penalty). If the charges are for the same offence, the first charge was used.

In total, up to 17 offender, case and processing characteristics were considered in explaining differences in sentencing outcomes. These characteristics are explained in more detail below.

Indigenous status: The identification as Aboriginal, Torres Strait Islander, or both Aboriginal and Torres Strait Islander (i.e. Indigenous status) is self-reported. If the main database recorded an offender as Aboriginal, or a Torres Strait Islander, or both, then the offender was coded as "Indigenous". Offenders who were listed as "unknown" or "refused" were dropped from the analyses. (The proportion of "sentencing events" where the Indigenous status of the offender was unknown or refused was between 6.5% to 8.0% in the adult data and around 3.0% in the higher children's court data.) All other offenders were coded "non-Indigenous".

Female: The identification of an offender's sex was taken as recorded in the main administrative data. Only personal defendants were included in these analyses. (Well under 1% of "sentencing events" did not have a record of the offender's sex.)

Age: This was calculated as age at the date of sentencing. The analyses for youth sentenced in the higher courts were restricted to defendants who were 17 years or under at the time of sentencing. This means that at the time the offence was committed the offender would have been less than 17 years of age.

Family, work and school status: From the transcripts of the judicial sentencing remarks, we manually coded:

- for adult offenders, ***whether the offender was primarily responsible for childcare*** (yes, mentioned by judge/no, not mentioned by judge),
- for adult offenders, ***whether the offender was in paid employment of any type*** (yes, mentioned by judge/no, not mentioned by judge),
- for young offenders, ***the offenders' family structure*** (lives with both biological parents/lives with single biological parent,/other living arrangements/not mentioned by judge),
- for young offenders, ***whether offender attended school regularly*** (yes, mentioned by judge/no, not mentioned by judge).

However, the lack of mention by a judge at sentencing does not mean that these characteristics were not known by the judge at the time of sentencing.

Prior criminal history: In the analyses of the adult offenders, criminal history was measured as a standardised additive index of number of prior convictions, number of prior convictions in the same offence category as the current sentenced offence, and number of prior terms of imprisonment in the jurisdiction of Queensland. This information was coded from criminal history extracted by the Queensland Police Service. All manual coding occurred on site at the Queensland Police Service so that confidentiality could be maintained. Data was then merged by case file number.

For the young offenders, criminal history information was manually coded from transcripts of judicial sentencing remarks. However, as this information was referred to differently by judges, or not at all, we were only able to code whether judges mentioned the youth had prior convictions, had prior convictions in the same category as the current sentenced offence, and had served prior terms of detention. Once again, a lack of mention by the judge on any of these criminal history

factors does not mean that these factors were not known by the judge at the time of sentencing.

Seriousness of principal offence: The seriousness of the principal offence was measured using the National Offence Index (NOI). Developed by the Australian Bureau of Statistics, the NOI ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1 to 155 with 1 being the most serious and 155 being the least serious. We then reverse coded the score for the principal offence to make the analyses more readable, so that higher scores indicated more serious offences.

Context of the commission of the principal offence: Four measures of the context in which the principal offence was committed were manually coded from the judicial sentencing remarks. These were whether:

- ***the offender took a primary or equal role in the commission of the offence*** (yes, mentioned by judge/no, not mentioned by judge),
- ***the offence was committed with co-offenders*** (yes, mentioned by judge/no, not mentioned by judge),
- ***the offence was committed in a private place*** (yes, mentioned by judge/no, not mentioned by judge),
- ***there was any evidence of premeditation in the commission of the offence*** (yes, mentioned by judge/no, not mentioned by judge).

The absence of a remark does not mean that these factors were not presented to the judge.

Multiple counts: This variable measures whether there were other conviction counts in addition to the principal offence. For methodological reasons (such as the small number of cases with more than 2 conviction counts), we could only include the presence of additional conviction counts. Because this variable had to be dichotomised into “yes, multiple convictions”/”no”, additional information on the seriousness of the other conviction counts could not be included in our models.

Guilty plea: This variable measures whether the offender entered a final plea of guilty. No pleas and not guilty pleas were grouped together.

On remand: For the adult offenders, this variable measures the last known in-custody status before the date of the sentencing hearing. Thus, it does not mean that the offender did not at some time, during the processing of his/her case, spend time in custody on remand.

Using case file numbers, this information was extracted directly from the administrative tracking database of the courts.

For the young offenders, whether a youth spent any time on remand was manually coded from judicial sentencing remarks. As a result, this variable measures whether this factor was noted by the judge, and the absence of such a remark does not mean that a young offender did not spend time on remand.

Culpability factors: Three factors were manually coded from the transcripts of judicial sentencing remarks, namely whether the offender has:

- ***poor physical and/or mental health*** (yes, mentioned by judge/no, not mentioned by judge),
- ***a substance abuse problem*** (yes, mentioned by judge/no, not mentioned by judge),
- ***a history of past victimisation (including abuse) experiences*** (yes, mentioned by judge/no, not mentioned by judge).

For young offenders, we also coded for the mention of child protection order or history. However, this was only noted by the judge for less than 1% of offenders in our sample. Thus, due to the insufficient number of cases, we were unable to include child protection order separately in our analyses.

Again, the absence of a remark does not mean that these factors were not known by the judge.