Deconstructing Incarceration: The Discursive Practices of the Judiciary in the NSW District Court

Sally Taylor

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To the memory of my mother, Michelle McKeown,

who passed away during the writing of this thesis.

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Statement of Authentication

The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.

Sally Taylor

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Abbreviations

ABS	Australian Bureau of Statistics
AGPC	Australian Government Productivity Commission
AIHW	Australian Institute of Health and Welfare
BOCSAR	Bureau of Crime Statistics and Research
DCJ	Department of Communities and Justice
JCA	Judicial Conference of Australia
NSW	New South Wales
The *Act*	*Crimes (Sentencing Procedure Act) 1999* (NSW)
UK	United Kingdom
USA	United States of America

Abstract

Imprisonment in Australia remains an important form of crime control despite its enormous economic costs and its failure to reduce crime. This is most concerning in New South Wales (NSW), having the largest national prison population and the highest prison expenditure. While the literature suggests that this growth is due to recent sentencing trends, very little is known in this context of the wider assumptions and discourses influencing the judicial decision to imprison offenders. To begin to address this gap, this study employed a critical discourse analysis (CDA) of recent judicial sentencing remarks from the NSW District Court to examine how imprisonment is being discursively legitimised by judges as an important form of crime control. Analysis found that despite being aware of the harms of imprisonment, judges justified its use as a 'punishment' tool via a retributive view of 'justice' that privileged the needs of the community over the criminal 'Other'. In line with penal abolitionism, these findings highlight the need to shift dominant discourses of imprisonment perpetrated in the *Crimes (Sentencing Procedure) Act 1999* (NSW) and by judges in the NSW District Court. A rethinking of these discourses may aid in addressing the high prisoner population by creating more equitable outcomes for offenders and thus assist the NSW Government's priority in creating 'safe, just, inclusive and resilient communities' (Department of Communities and Justice (DCJ) 2019a, para. 1).

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1 Introduction

Since the 1980s, the number and rate of people imprisoned around the world has risen rapidly, including those in Western nations such as Australia, the United States of America (USA), United Kingdom (UK), Canada and New Zealand (Jacobson, Heard & Fair 2017). This growth is concerning, given that prisons have been found to generate enormous financial costs while simultaneously being linked to recidivism and further disadvantaging those imprisoned (Australian Institute of Health and Welfare (AIHW) 2019; Auty & Liebling 2017; Jacobson, Heard & Fair 2017; Nagin, Cullen & Jonson 2009). In light of its overt failures, the question remains as to why imprisonment is utilised as an important form of crime control.

Recent sentencing trends in Australia indicate that more people are being incarcerated than ever before. According to the ABS (2019a), the Australian adult prisoner population[1] reached its highest-ever recorded level during the June quarter of 2019, with 43,306 people being held in custody daily. Most of this prison growth is concentrated in New South Wales (NSW) with long-term trends showing steady increases since 2011 (Bureau of Crime Statistics and Research (BOCSAR) 2019a). In addition, NSW has the highest number of people (including Aboriginal and Torres Straight Islanders) imprisoned nationally, with 13,658 prisoners in September 2019 (ABS 2019a). The latest figures from the Australian Government Productivity Commission (AGPC) (2019) show that NSW also has the largest recurrent prison expenditure[2], having spent $1.16 million on corrective services in 2017-18. The number of correctional facilities is also highest in NSW, with 53 out of a total of 118 national

[1] Prisoners aged 18 years and over. For the remainder of this thesis, the term 'prisoner population' will be used to refer to the adult prisoner population.
[2] Recurrent expenditure is the combined total of net operating expenditure (i.e. operating expenditure excluding operating revenues, including salaries, other operating expenses, grants, subsidies, expenses for corporate support functions) and capital costs (i.e. depreciation costs and debt service fees).

facilities operating across the state (AGPC 2019). With $3.8 billion recently allocated by the NSW Government to update, expand and build more prisons under the *Reducing Reoffending* strategy and *Better Prisons* program, the growth in prisoner numbers are forecasted to continue (Department of Communities and Justice (DCJ) 2017). With the aim of 'achieving safe, just, inclusive and resilient communities under one roof' (DCJ 2019a, para. 1), the NSW Government are also focused on improving outcomes for those at-risk of offending and reducing reoffending following release from prison.

Given the high NSW prisoner population and subsequent increases in prison expenditure, it is important to ask whether crime rates are increasing or whether these trends reflect other socio-political processes. Recent data from BOCSAR (2019b) suggests that crime rates are not affecting prisoner growth, with most offence categories having decreased or remained stable over the last five years. Rather, recent changes to sentencing policy and practice including increases in the proportion of convicted offenders and defendants on remand, in the rates of arrival and length of stay in prison, and in breach of bail and bail refusal, account for increases in the prisoner population (Ramsey & Fitzgerald 2019; Weatherburn et al. 2016).

While changes in sentencing offer insights into recent prisoner trends, more attention is needed to analyse the wider assumptions and discourses underpinning the reliance on imprisonment as an important form of crime control in NSW. The present study positions itself against this research lacuna by examining how a sentence of imprisonment is being discursively legitimised in the NSW District Court. The NSW District Court was chosen as a case study for this project as it deals with the majority of criminal offences, including serious offences with the exception of treason and murder (NSW District Court 2018). In addition, recent data shows that most defendants finalised in the higher courts, including the NSW

District Court, were given custodial sentences during 2017-18 (ABS 2019b). Given this heavy use of imprisonment, the NSW District Court will provide a good focal point for the present study in examining the positioning of imprisonment in NSW judicial sentencing practices.

In the following sections of this chapter, the aim and objectives are outlined and a contextual background for this research is provided. This includes an overview of sentencing in Australia with a specific focus on the sentencing process and practice of imprisonment in NSW. A brief review of the existing literature on the harms of imprisonment and of the disadvantage of prisoners is also given. The final section of this chapter provides an overview of the remaining chapters of this thesis.

1.1 Research Aim and Objectives

The aim of this research is to investigate how imprisonment is being discursively legitimised as an important form of crime control in the NSW District Court. In order to achieve this aim, this project utilised the methodological framework of critical discourse analysis (CDA) to examine judicial sentencing remarks from criminal cases that included a sentence of imprisonment in 2017. This approach to analysing text (detailed in Chapter Four) provides a helpful lens for examining the role of language in producing, reinforcing and challenging wider social and cultural processes (Fairclough 1992). The project focus on judicial sentencing remarks is therefore important, as the judiciary are known as 'moral entrepreneurs' and 'public discourse leaders' who play an important role in constructing how 'justice' is understood and achieved (Coyle 2013, p. 59). Thus, to address the project aim within a CDA framework, this study was framed by the following three objectives:

1. To examine judicial constructions of imprisonment and justifications for imposing a sentence of imprisonment on an offender;
2. To identify and analyse how 'crime' and 'criminals' are socially constructed by judges; and
3. To investigate dominant understandings of 'justice' and 'morality' within constructions of imprisonment and of 'crime' and 'criminals.

1.2 Sentencing in Australia

In Australia, sentencing is the system of law through which penalties are imposed and administered on offenders by the State. Australia has nine criminal jurisdictions, including six states, two mainland territories and a federal jurisdiction. The Australian court system comprises of high, intermediate and low courts. The High Court of Australia (including the Court of Appeal) is the highest court level Australia-wide, deciding cases and hearing appeals from Federal, State and Territory Courts (High Court of Australia 2010). In individual states and territories, the Supreme Court is the highest court, hearing the most indictable cases including murder and manslaughter (Judicial Conference of Australia (JCA) 2014). The District or County Courts are intermediate courts which deal with sentencing matters relating to serious offences, while the Magistrates or Lower Courts hear the majority of prosecutions for less serious offences (JCA 2014).

The courts are known as the 'third arm' of government[3], meaning that judges and magistrates, otherwise known as the judiciary, are independent from the legislature and have

[3] There are three arms of the Australian Federal Government (that are mirrored in the state/territory governments)—the Parliament, the Executive Government, and the Judicature (usually called the Judiciary). This division is based on the principle of separation of powers which allows the arms to act as checks and balances on each other. The Parliament (consisting of two democratically elected Houses: the Legislative Assembly and the Legislative Council) is responsible for making and enacting laws. The Executive is made up of public service and government ministers that are responsible for operationalising government laws and programs. Executive agencies include parole boards and correctional authorities. The Judiciary, as stated, has the power to interpret laws and to judge whether they apply in individual cases (Parliament of Australia 2019).

the power to interpret and apply the law in an impartial manner (JCA 2019; Parliament of Australia 2019). The judiciary are appointed by the government (Federal, State or Territory) and are required to have legal qualifications, experience and training suitable for the position, often elected from within the practising legal profession, prosecutorial and legal aid services, public service and occasionally from academia (Freiberg 2010; JCA 2019).

Since the 1980s, all criminal jurisdictions in Australia have enacted sentencing legislation[4] to provide a framework for sentencing practice. These laws contain the sentencing dispositions available to the courts, such as powers of imposition, suspension and breaches in legislation, as well as provide general guidance of sentencing principles, purposes and the appropriate use of sentencing options (Freiberg 2010). They also identify aggravating and mitigating circumstances of the offence, including the gravity and prevalence of the offence, harm to the victim and mental state of the offender, and factors specific to the offender, such as character, age, prior convictions, guilty plea and display of remorse (Findlay, Odgers & Yeo 2014). These statutes do not specify the hierarchy or weighting the judiciary should apply to these various elements but instead offer general guidance to the courts (Freiberg 2010).

1.2.1 Sentencing in NSW

The NSW court system consists of all three levels of criminal courts (Supreme, District and Local Court), as well as specialist courts including the Children's Court, Land and Environment Court, Coroner's Court, Drug Court and the Industrial Relations Commission (DCJ 2019b). According to the NSW Sentencing Council (2017), offenders are sentenced in a sentencing hearing after they plea or are found guilty of an offence in a summary hearing in

[4] These statutes include: Criminal Law (Sentencing) Act 1988 (SA), Sentencing Act 1991 (Vic), Penalties and Sentencing Act 1992 (Qld), Sentencing Act 1995 (NT), Sentencing Act 1995 (WA), Sentence Administration Act 1995 (WA), Sentencing Act 1997 (Tas), Crimes (Sentencing Procedure) Act 1999 (NSW), and Crimes (Administration of Sentences) Act 1999 (NSW).

the Local Court or following a trial in the District or Supreme Court. Sentencing is conducted before a judge or magistrate who must take into consideration factors relevant to the charge and who will often make sentencing remarks to clarify his or her decision.

In NSW, the *Crimes (Sentencing Procedure) Act 1999* (NSW) (abbreviated hereafter as the *Act*) governs sentencing practice. Sentencing options in NSW include imprisonment, Intensive Correction Orders (ICO), Community Corrections Orders (CCO), Conditional Release Orders (CRO), fines, conviction with no other penalty, deferred sentences, intervention programs and rising of the court (NSW Sentencing Council 2018). According to Section 3A of the *Act*, the purposes for which a court may impose a sentence on an offender are as follows:

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

In common with other Australian sentencing legislation, this statement of purposes is premised on the punishment philosophies of retributivism, which is focused on the idea of 'deserved' punishment, and on utilitarianism, which is concerned with the prevention of future crime[5] (Hudson 2003). Thus, subsections (a), (e), (f) and (g) can be seen to follow a retributivist logic in punishing the offender, while (b), (c) and (d) focus on the future consequences of the sentence on the offender and community. As with other sentencing factors, judges in NSW are required to consider and weigh the purposes of sentencing when

[5] See Chapter Two, Section 2.2 for a detailed discussion on these two theories of punishment.

determining the appropriate sentence for individual cases (Judicial Commission of New South Wales 2019).

1.2.2 The Sentencing Practice of Imprisonment

In Australia, imprisonment is the harshest criminal sanction available to the courts, operating as the 'final institution' by which all other sentencing options are measured and determined (Findlay, Odgers & Yeo 2014, p. 206). A sentence of imprisonment refers to a period of incapacitation within state-run custodial institutions which vary in their levels of secure detention (minimum, medium and maximum), in their occupational focus and in their integration into the community (Findlay, Odgers & Yeo 2014). Imprisonment is therefore viewed as a sanction that will almost certainly inflict pain on offenders and the only effective means to deprive liberty (Bagaric, Edney & Alexander 2018).

A sentence of imprisonment in NSW may be served in a correctional centre, such as a prison, or in a drug treatment centre if the sentence is imposed in the Drug Court (NSW Sentencing Council 2018). A prison sentence consists of the maximum term that the offender may be required to serve in detention (known as the 'head sentence') and the non-parole period, which must not be less than three-quarters of the term of the sentence (Potas 2001). If an offender has served their non-parole period and are not subject to any other custodial terms, they may be eligible for conditional release on parole to serve the remaining time of their sentence under supervision in the community (Potas 2001). Parole is an extension of the initial sentence and is thought to provide an effective way of reintegrating the offender into the community while protecting the public (DCJ 2018).

Due to the severity of imprisonment, courts in Australia have legislative provisions which restrict its use when other sanctions are deemed more appropriate. This provision is known as 'last resort' which is states that, under Section 5(1) of the *Act*, 'A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate'. Despite having this safeguard, Bagaric, Edney and Alexander (2018) point out that judges are not are not obliged to give reasons for rejecting non-custodial sentences when they deem a sentence of imprisonment appropriate. This suggests that the judicial decision-making process and specifically the decision to imprison is more nuanced than is currently implied by the *Act*.

1.3 Prisoners, Disadvantage and the Harms of Imprisonment

Given the high prisoner population in NSW and the prioritisation of funds to maintaining and expanding the prison system, it is important to ask whether imprisonment is achieving its intended outcomes. According to the DCJ (2019c, para. 3), the goal of Corrective Services is to 'preserve community safety by keeping inmates secure, supervising offenders in the community, and reducing reoffending'. Thus, imprisonment is positioned as protection of the community from criminals through incapacitation, and as rehabilitative – converting offenders into law-abiding citizens.

Despite the benevolent aims of imprisonment as purported by the DCJ, research has repeatedly shown that imprisonment is 'criminogenic'. For example, studies in the USA and UK have shown that by providing a criminal learning environment for offenders and reducing their quality of life, imprisonment does not deter offenders from crime but increases their likelihood of reoffending (Auty & Liebling 2017; Duwe & Clark 2017; Nagin, Cullen & Jonson 2009; Vieraitis, Kovandzic & Marvell 2007). Similarly, in

Australia, recidivism rates are higher among people exiting prison than for those given non-custodial sentences (BOCSAR 2019c; Gelb, Fisher & Hudson 2013; Weatherburn 2010). These findings are consistent with research indicating that because prison is seen as a place to 'survive', the experience of imprisonment increases inmates' desire to reoffend rather than to reform (Goulding 2007; Halsey 2007). Problems also occur after release, with many prisoners in Australia finding it difficult to find housing and appropriate employment, as well as reporting a heightened risk of risky substance abuse, making it difficult to resume a law-abiding life (Cutcher et al. 2014; Hardcastle et al. 2018).

In addition to having a crime-producing effect, imprisonment is also linked to poor health and well-being among prisoners. In 2018, 11 per cent of people in Australian prisons experienced assault and two per cent experienced some form of sexual assault (AIHW 2019). Such violence has been previously reported as everyday occurrences among prisoners in Queensland and South Australia (Goulding 2007; Halsey 2007). In addition, 14 per cent of prison discharges in 2018 suffered from high levels of psychological distress, 16 per cent reported using illicit drugs in prison and five per cent reported being at risk of self-harm and suicide (AIHW 2019). The recent figures for deaths in custody are even more alarming, with 91 deaths reported in 2016-17, occurring from natural causes (such as cancer and heart disease), hangings, external trauma (such as head injuries), from alcohol/drugs and from 'other' or 'multiple' causes (Gannoni & Bricknell 2019).

People in prison are also significantly more disadvantaged than the general population. Research by the AIHW (2019) found that prisoners are overwhelmingly from low socio-economic backgrounds, with many being unemployed, homeless, struggling with substance abuse and having low levels of education. Many prisoners have also had one or more parents

or carers in prison during their childhood and have been in prison or in juvenile detention. In addition, prisoners have higher levels of cognitive impairment and mental health issues as well as higher rates of risky alcohol consumption, illicit drug use, tobacco smoking, chronic disease and communicable diseases than the non-prisoner population (AIHW 2019). This disadvantage is further exacerbated for Aboriginal and Torres Strait Islanders who have lower social, economic and health outcomes than the non-Indigenous population and make up 28 per cent of prisoners in Australia while accounting for only 3.3 per cent of the total Australian adult population (ABS 2019a; 2019c; AIHW 2019).

1.4 Conclusion and Summary of Chapters

The policy implications for the findings in the above section are significant, as they demonstrate that the use of custodial sentences may have the unanticipated consequence of making the community less safe via recidivism and exacerbating the vulnerability and marginality of those imprisoned. Given this failure of prison to meet its purported aims, it is important to examine the reasons for ongoing government support. This project utilises abolitionist perspectives (discussed further in Chapter Two) to challenge the use of imprisonment and initiate change by shedding light on the tools that could be utilised to address social problems beyond the prison. In addition, it provides awareness about the role of language in maintaining a system that is designed to harm offenders rather than promote human flourishing. Such awareness can help decision makers to be more intentional with their language choices and to move towards more effective means of providing ‘safe, just and resilient communities’ (DCJ 2019a, para. 1) by viewing crime as a fundamentally social rather than ‘criminal’ issue (Brown & Schept 2016; Scott 2018).

This thesis consists of eight chapters. Following this introductory chapter, Chapter Two provides an overview of the key phases in Western penology, including the expansion of the prison system and the rationalities informing punishment practices, and frames the present research within a penal abolitionist perspective. Chapter Three reviews the sentencing literature, discussing the various discourses and changes in sentencing policy and practice that are affecting imprisonment trends in Australia and in other parts of the Western world. Chapter Four details the methodology of this project, including the data collection and analysis methods used to operationalise the research aims and objectives. This chapter also outlines the theoretical framework informing the CDA method and how judicial sentencing remarks can be seen as a form of discourse.

Chapters Five to Seven present a discussion of the research findings in line with the research aims and objectives. In Chapter Five, imprisonment is revealed to be constructed as a means to achieve specific sentencing purposes that prioritise the community over the offender. Chapter Six details how judges draw on moral dichotomies and reinforce dominant social constructions of the criminal 'Other' to legitimise the use of imprisonment. Chapter Seven examines how judges view the effects of imprisonment and highlights how judges use techniques of neutralisation to justify sentencing offenders to imprisonment. Lastly, Chapter Eight concludes the thesis and draws together the key findings of this study, with specific mention of how the research aim and objectives were achieved. In this final chapter, the contributions of this research to existing scholarship are discussed and suggestions are made for further research.

2 The Logic and Legitimacy of Punishment

To provide important context for the research presented in this thesis, this chapter outlines the development of imprisonment as an important form of crime control and of the rationalities informing its expansion in Western nations. The first section provides a review of the key phases of modern Western punishment or 'penality', highlighting how the practice of punishment has shifted its focus from the individual to managing 'dangerous' groups. Underscoring such practices are the traditional theories of retributivism and utilitarianism, which are discussed in Section 2.2 as providing inadequate grounding for the infliction of pain through punishment. Within the context of such criticisms, penal abolitionism is introduced in Section 2.3 as an alternative framework through which current responses to crime can be examined and the current State penal apparatus challenged. This approach serves as a guiding conceptual framework for the examination of judicial sentencing remarks presented in following chapters.

2.1 Key Phases of Western Penality

Over the last three centuries, changes to Western penological thinking have significantly altered the management and control of crime. Prior to the mid-eighteenth century in the UK, USA and Central Europe, physical punishment was the primary means of enacting 'justice' for criminal behaviour and included public executions, mutilations and the use of stocks (Hudson 2002). Such punishments were usually arbitrarily distributed, and their severity bore little relationship to the crimes committed. As nations industrialised in the late eighteenth century, the use of physical punishment fell out of favour and criminal justice systems turned

to alternative forms of ‘punishment’ that were thought to align more closely to the mentalities of offenders and the crimes committed.

This period of ‘penal modernism’ (c. 1750-1960) saw the emergence of imprisonment as the general form of modern punishment, seen as a multi-pronged and more “humane” means of punishing offenders for their crimes. According to Hudson (2002), imprisonment was viewed as more socially and morally progressive for two main reasons. First, prison sentences appeared to be more ‘lenient’ than previous forms of corporal punishment. Secondly, incarceration was underpinned by the rationale of reformation and not just the punishment of offenders. However, some key thinkers, such as Michel Foucault in his influential book *Discipline and Punish: The Birth of The Prison* (1995), observed that imprisonment resembled a change in the target and objective of punishment rather than a reduction in its severity or quantity:

> [S]ince punishment is no longer the body, it must be the soul. The expiation that once rained down upon the body must be replaced by a punishment [incarceration] that acts in depth on the heart, the thoughts, the will, the inclinations (Foucault 1995, p. 16).

Foucault (1995) argued that imprisonment was less concerned with punishing the body and more concerned with disciplining the individual and ridding them of their moral deficiencies. This disciplinary mode of power emerged alongside the human and social sciences (psychiatry, criminology, sociology, psychology, medicine etc.), defining notions of ‘right’ and ‘wrong’ behaviour and producing dichotomies of the law-abiding and the criminal. This knowledge informed the criteria for criminal classification and the means to punish accordingly (Foucault 1995).

According to Foucault (1995, pp. 231-233), the prison system operated as the primary apparatus through which disciplinary power was realised and where 'delinquent' individuals were subjected to training so as to render them docile, conforming, and 'useful'. Prison was seen to be the 'self-evident' and 'natural' punishment for wrongdoers, depriving them of their liberty and subjecting them to submission, coercion and labour. This mode of punishment was illustrated in the development of the panopticon prison, a blue-print design by Jeremy Bentham in which prison cells surrounded a circular central control area. Through this design guards could observe prisoners at any given time, operating to coerce prisoners into obedient behaviour as an effect of the ubiquitous 'gaze' (Foucault 1995).

Since the post WWII period, criminal justice has followed an actuarial logic concerned more with identifying and minimising 'risk' than reforming offenders (Feeley & Simon 1992; Garland 2001). In particular, prisons have been relied on to protect society against so-called 'dangerous Others' by removing them from public circulation. This 'new penology' (Feeley & Simon 1992, p. 449) operates under a managerialist ethos that views economy, efficiency, and the effective use of resources as measures of success. Crime control has subsequently shifted to 'preventative' partnerships between the State, private sector and community and through the neoliberal responsibilisation of citizens to manage the ever present 'risk' of crime (Garland 2001).

Despite this emphasis on measurability and accountability, criminal justice policies in Western nations are increasingly punitive and tend to follow a 'penal populist' stance that privileges public opinion over demonstrated efficacy. Yet, rather than reflecting the public voice, populist policies are manufactured and 'sold' to the public to win votes and generally do not seek to reduce crime (Pratt 2007). Criminal justice in Australia has subsequently

followed a ‘law and order commonsense’ premised on the belief that more law enforcement and harsher sentences reduce crime and that prisons are the answer to the ‘crime’ problem (Brown & Hogg 1996; Tubex et al. 2015). The present study seeks to examine the extent to which the courts feed into this punitive framework via analysing recent judicial sentencing remarks in the District Courts of NSW.

2.2 Traditional Theories of Criminal Punishment

As demonstrated in the previous section, punishment has historically been viewed as the correct response to criminal behaviour, with imprisonment seen as an important punishment tool. Punishment, what it is and what it aims or should not aim to accomplish varies across contexts. Nevertheless, several essential criteria that distinguish criminal punishment from other forms of pain and unpleasantness have been identified by punishment scholars. For example, Hart (cited in McPherson 1967, p. 21) argues that there are five elements of criminal punishment:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offence against legal rules.
(iii) It must be of an actual or supposed offender for his [or her] offence.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

In addition to these five elements, a sixth condition is suggested by Benn and Peters (cited in Hudson 2003, p. 2), who contend that the infliction of pain or unpleasantness should be the essential outcome of punishment. The punishment with which Western penality is concerned, then, is the punishment of criminals (as a pain-inflicting practice), pronounced and administered by the State. The remaining question of why criminals should be punished has several possible answers, and these fall under two primary theories of punishment,

retributivism and utilitarianism. The following section provides a review of these approaches, which were discussed in Chapter One (Section 1.2.1) as underpinning the sentencing purposes under the *Act*.

2.2.1 Retributivism

Retributivism or retribution is a backward-looking approach that justifies punishment based on 'desert', meaning deserved. The key principles of modern retributive punishment include the belief that punishment should be in return for crimes past rather than in anticipation of crimes future, and that punishment should be in proportion to the crime (Hudson 2003). This theory therefore posits that the guilty deserve to suffer and that the proper function of punishment is to impose the deserved suffering (Duff 2009).

Retributivism is underpinned by various propositions, including forfeiture of rights, reprobation and just deserts. Forfeiture of rights is based on the belief that offenders have gained an unfair advantage and in order to even out the harm caused, they must forfeit that which the victim has lost (i.e. their rights) (Lacey 1994). Additionally, it is argued that punishment should be deployed as a means of reprobation, or moral denunciation of wrongdoing. Reprobation is seen as painful for the offender because it involves the negative judgement of a significant other (Scott 2018). Lastly, punishment is justified on the principle of 'just deserts' or proportionality, which holds that penalties should be appropriate to the seriousness of the crime. A punishment is therefore considered 'just' if it reflects the extent of the harm caused to the victim(s) (Hudson 2003).

Due largely to a concern with morality, retributivism focuses on the culpability or blameworthiness of offenders. Culpability serves as a function of the gravity of the harm

caused and the degree of responsibility of the actor which produces a moral judgement about the wrongfulness of the behaviour in question (Lacey 1994, p. 18). Thus, the perceived moral culpability of an offender not only gives society a right to punish blameworthy offenders, but a *duty* to punish them (Moore 2009). Society therefore has a moral obligation under retributivism to set up penal practices and institutions, so that 'blameworthy' offenders receive their due punishment (Moore 2009).

Retributive theories of justice have, however, been criticised on a number of grounds. First, retributivism assumes that there is some fixed objective 'truth' about what is right and wrong, which ignores the role of power in constructing reality, including the ideas of crime, justice and punishment (see Coyle 2013; 2016). Furthermore, retributivism fails to justify why punishment should incorporate such narrow conceptions of justice that seek to harm offenders, as opposed to other responses based on the values of mercy, forgiveness and human dignity (Scott 2018; Lacey 1994). There are also several difficulties with the different propositions of retributive justice. For example, it is unclear what sanction would forfeit a set of rights equivalent to those victimised by different offenders, such as a sex offender, petty thief, or reckless driver (Lacey 1994, p. 24). In addition, reprobation may not be an effective means for facilitating reform, as it fails to acknowledge the complex factors impacting the criminalisation process, as well as the stigmatising effect of being labelled a 'moral defect' (Scott 2018, p. 94). Lastly, when considering 'just deserts, it is difficult to deliver a truly proportionate sentence as one cannot objectively assess the offence and understand the relative pain that an offender experiences through punishment (Hudson 2003; Scott 2018).

2.2.2 Utilitarianism

In contrast to the theory of retributivism which focuses on punishing crimes past, utilitarianism is a forward-looking theory that justifies punishment on its anticipated future consequences. This justification combines moral and political philosophy by focusing on maximising human happiness ('the good') and establishing a foundation for state obligation and intervention (Hudson 2003, p. 18; Scott 2018). The infliction of pain and suffering is considered an 'evil' unless it serves the greater good of preventing harm and suffering through the avoidance of future crime (Hudson 2003). This aim is thought to be achieved through three primary ways: deterrence, rehabilitation and incapacitation.

Deterrence is a preventative strategy based on the belief that people will refrain from offending through fear of punishment. According to utilitarian theory, if punishment does not deter the offender from crime and other persons who may consider committing similar crimes in the future, then it is adding to, rather than subtracting from, the sum of human suffering (Hudson 2003). The type of deterrence concerned with individual offenders is called specific deterrence, where the focus is not to remove the offender's desire to offend but to make them afraid to offend (Bentham 2009). Punishment can also serve as a general deterrent, in which the punishment suffered by an offender serves as an example of what another will suffer if found guilty of the same offence (Bentham 2009).

In contrast to specific deterrence, the utilitarian goal of rehabilitation is aimed at reforming the individual offender of their desire to offend. Scott (2018, p. 88) points out that there are three fundamental beliefs underscoring rehabilitative punishment. These include the assumption that offenders are different from 'normal' people because of their offending behaviour; that such people should and can be 'normalised' or 'cured' through social

engineering; and that this transformation can be achieved through punishment generally and imprisonment specifically. The objective of rehabilitative punishment therefore includes reintegrating the offender into society after a period of punishment, and to design the content of the punishment to achieve this (Hudson 2003).

The last goal of utilitarianism is incapacitation or removing an offender's physical capacity to offend. Incapacitation can be achieved through various practices of punishment, including capital punishment, physical maiming, banishment and imprisonment and through two types of incapacitation. These include collective incapacitation which refers to sentences aimed at containing offenders based on the crime committed, and selective incapacitation, which is directed at high-risk offenders perceived to be a danger to the community (Scott 2018). Incapacitation thus serves a punitive role in depriving an offender of their liberty and an instrumental role in protecting the community from the offender.

As with retributivism, utilitarian theories have attracted several criticisms. For example, Scott (2018) argues that the utilitarian approach assumes a commonsense link between human behaviour and the utility of punishment. People may be deterred from offending for a range of reasons (e.g. to maintain reputation or out of fear of stigmatisation) and actions can be determined by multiple factors (e.g. opportunity, emotions, impulse, excitement) that may not be thought out in advance. In addition, the goal of rehabilitation can further stigmatise offenders by labelling them 'different' to the rest of the community, coercing them into particular behaviour and placing additional punishment on them until they are deemed 'cured'. Scott (2018) also points out that in the search for the 'greater good', incapacitation does not acknowledge the harms experienced by people in prison (e.g. rape, violence and institutionalisation), or of their families and communities (e.g. financial stressors and

relationship breakdowns). Lastly, the success of incapacitation is difficult to measure, as it relies on predictions of future offending and the assumption that the offender would have offended had they not been incarcerated (Bagaric, Edney & Alexander 2018).

2.3 Penal Abolitionism

Given the limitations of retributivism and utilitarianism to provide viable justifications for the infliction of punishment, scholars have questioned whether these inadequacies will ever be addressed and if the logic and practices of punishment need to be reconsidered (see for example, Brown & Schept 2017; Coyle 2016; 2017; Ruggiero 2010; Scott 2018). This reconceptualisation of punishment is central to the theoretical position and movement of new abolitionism, or more traditionally known as penal abolitionism. Penal abolitionism maintains the stance that current forms of punishment are inherently morally corrupt, and that the criminal justice system constitutes a social problem in itself (Ruggiero 2010; Scott 2018).

Penal abolitionists are united in their opposition to the current penal apparatus of the Capitalist State and in any practice based on the deliberate infliction of pain (Scott 2018). Rather than solving conflicts, criminal punishment is viewed as a medium of authoritarian State violence and control that is primarily achieved through the pain-inflicting practice of imprisonment (Brown & Schept 2017; Scott 2018). For example, UK penal abolitionist David Scott describes prisons as:

> …hostile landscapes, which are hotbeds for institutionally-structured violence: the constant and systematic deprivation of human need. What grows best in these physical conditions are hurt and resentment–weeds that strangle even the strongest commitments to values like love, kindness and compassion (Scott 2018, p. 22).

Rather than fostering an environment of positive change, Scott (2018) argues that prisons are dehumanising and counterproductive institutions that are more likely to harm people than help them. These harms were identified in Chapter One (Section 1.4), showing that prisoners are further marginalised through their imprisonment and often reoffend after release. Thus, as Hall (2016) points out, recidivists are left to suffer the consequences and blame for the failure of the prison system to rehabilitate offenders and prevent crime. An abolitionist perspective therefore seeks to challenge dominant notions of 'crime' and 'justice', and specifically the 'utopian' view of prison that seeks to improve prisons and make them "work" as a place of safety and reform (Scott 2018, p. 23).

As an alternative to the current State penal apparatus, abolitionists argue for a 'transformative justice' that is non-punitive and seeks to 'facilitate the realization of social rather than criminal justice' (Baldry, Carlton & Cuneen 2015, p. 171). Notions of 'justice' are to be understood as fundamentally social, with efforts put towards addressing the root causes of crime as well as the needs of all victims of social injustice, including those morally condemned and imprisoned (Brown & Schept 2017; Scott 2018). Some recent examples of such interventions include the use of peer juries, peace circles, and community involvement to resolve conflicts, community-based support and assistance for offenders, and therapeutic communities intentionally designed to help offenders re-build their lives and receive the treatment they need (Scott 2017).

As with the theories of retributivism and utilitarianism, penal abolitionism is not without critique. As Scott (2018, p. 99) points out, some critics argue that this approach underestimates the utility of punishment and that its alternatives are 'morally unacceptable' and inappropriate for the most serious offences. In addition, Duff (2001, p. 34) argues that

abolitionists should call for alternatives *to* punishment rather than *alternative punishments* but, as the non-punitive responses advocated by abolitionists restrict the possibilities of what punishment can encompass and achieve. In spite of such criticisms, penal abolitionism provides an alternative framework for responding to offending that avoids being too moral or political like traditional theories. Rather than seeking to justify the infliction of pain via 'desert' and utility, penal abolitionism is focused on addressing the root causes of offending and on the aim of human flourishing, including for those criminalised and imprisoned by society. This stance, which is advocated in this research, will guide the analysis of judicial sentencing remarks in legitimising a sentence of imprisonment in the NSW District Courts.

2.3.1 The Social Construction of Crime

One of the key areas of focus for new abolitionists is the social construction of crime. Social constructionism is a theory that views language as inviting specific interpretations of the world that become 'real' and 'true' but that have no independent existence outside of human interaction (Berger & Luckmann 1966; Henry 2009). That is, what may seem 'right' or commonsensical has been socially constructed through language to be viewed that way. It is therefore argued that there is no objective or fixed certainty about what constitutes a "crime" but that everyday language constructs and legitimises specific interpretations of and responses to crime (Coyle 2016).

According to penal abolitionists, conventional definitions of crime are based on social constructions of criminal harm. Scott (2018) points out that while there are many kinds of harmful behaviours in a society, the criminal law only identifies some as criminal. Michael Coyle, another influential penal abolitionist in the USA, suggests that this narrow conception of criminal harm exposes the criminal justice system as preoccupied with the management of

only certain crimes and certain criminals (Coyle 2016, p. 16). He argues that while most people participate in some level of wrongdoing during their lives, only those peoples and behaviours identified as 'deviant' or 'immoral' are criminalised. Indeed, 'so-called' perpetrators of crime are usually people of colour, poverty, gender and difference – groups constructed as having "low respectability" and a "high risk" of offending (Scott 2018, p. 68).

In addition to notions of criminal harm, the criminal justice system is built upon constructions of criminal blame. Hulsman (cited in Ruggiero 2011, p. 101) points out that '[c]riminal justice is perpetrator-oriented, based on blame-allocation and on a last judgement view on the world'. That is, criminals are constructed as deserving of suffering and of the public's rightful resentment, indignation and disapprobation through the criminal law, which reinforces the image of pain-infliction as the natural and 'just' response to criminal behaviour. Penal abolitionists have challenged the views of criminal harm and criminal blame by arguing that any penal response cannot be considered 'just' if it generates injustice (Scott 2018). In line with such criticisms, this project will seek to determine the extent to which social constructions of 'crime' within the court system legitimise imprisonment as a 'just' punishment via the CDA of recent judicial sentencing remarks from the NSW District Court.

2.4 Conclusion

This chapter offered an overview of the historical developments in Western penality and of the rise of prison as an important crime control tool, including the use of imprisonment for individual reform, State control and managing 'dangerous' populations. While traditional theories of punishment rely on narrow conceptions of 'justice', they continue to underpin sentencing practices in Australia and in the state of NSW. As one of the objectives of this

project, how judges rely on the traditional theories of punishment to justify a sentence of imprisonment will be analysed in Chapter Five.

Penal abolitionism was introduced as an alternative approach that challenged traditional theories of punishment with the intention of seeking new, non-punitive measures that resolve conflicts and reduce further harm. The project reported in this thesis contributes to the penal abolitionist movement by challenging sentencing discourses that reinforce Capitalist State power through imprisonment. By engendering a greater awareness of the impact and power of language in constructing dominant ideas about crime and justice, this study seeks to inform revisions of justice policy to contribute to building an equitable society with justice for all victims of injustice, including those who are processed as law breakers. In the following chapter, a review of the existing sentencing literature regarding imprisonment is provided to ascertain an understanding of the discourses and social driving the reliance on imprisonment in Australian sentencing.

3 Sentencing and the Reliance on Imprisonment

As discussed in Chapter One, recent changes to sentencing policy and practice have accounted for much of the increase in the NSW prisoner population. However, these influences are indicative of recent rather than long-term imprisonment trends. Through a critical review of the sentencing literature in Australia and in other Anglo-phonic countries, this chapter provides an overview of the discourses and influences that are driving the reliance on imprisonment in Western nations. It begins by briefly describing the political, historical and social context of criminal justice in Australia, drawing attention to the dominant rhetoric informing the increasing use of tougher sentencing practices. Changes in the role and the power of the Australian judiciary are discussed, followed by a review of the existing research on discourses underpinning sentencing practice. This study aims to build upon this existing literature by examining the extent to which these discourses and influences are employed in the NSW District Court to legitimise a sentence of imprisonment.

3.1 The Growing Punitiveness in Australia

Over the past two decades, penal populist campaigns in Australia have had a major effect on sentencing and particularly on the use of imprisonment. Campaigns under the "law and order" and "tough on crime" rhetoric introduced across Australia in the 1980s fuelled calls for more punitive sentencing policies (Mackenzie, Stobbs & O'Leary 2010; Tubex et al. 2015). Reforms under these campaigns led to the creation of new offences, increases in sentence lengths for serious offences and non-parole periods, and in some cases, the removal of non-parole periods altogether (Tubex et al. 2015). More recently, changes to bail legislation in NSW, Victoria and SA have seen more people being refused bail and put on

remand, and in Victoria and WA there have been restrictions put on parole and the imposition of new sentences (Bartels et al. 2018; BOSCAR 2018; Tubex et al. 2015). Mandatory sentences have also been introduced in most Australian jurisdictions, covering offences of assault and murder of police officers, murder, rape and other violent offences, offences specific to motorcycle gang members, child sex offences, people smuggling offences and for residential burglary by repeat offenders (Law Council of Australia 2014).

According to Tubex et al. (2015), populist policies in Australia have been characterised by the privileging of public opinion over expert evidence, the heightened role of the media in crime issues and a belief in the effectiveness of prison to control crime. The assumptions underpinning this punitive rhetoric are the belief that crime is as worse as it has ever been, that the criminal justice is 'soft' on crime, and that the solution is more police with more powers and tougher penalties from the courts (Brown & Hogg 1996). Scholars have therefore suggested that rising prison populations are evidence of this growing punitiveness of criminal justice (Freiberg 2016; Tubex 2015). There is, however, minimal empirical evidence for these claims. This study begins to fill this gap in research by analysing recent judicial sentencing remarks from the NSW District Court to test the influence of this growing punitiveness on sentences of imprisonment.

Central to the punitive rhetoric of Australian criminal justice is the pervasive influence of actuarial justice. As defined in Chapter Two (section 2.1), this approach focuses on risk minimisation and managing 'dangerous' groups. Since the 1990s, a number of legislative measures have been introduced to increase sentence lengths in the name of 'community protection'. These measures are based on containing specific individuals and include the imposition of indefinite, mandatory, guideline and presumptive sentences, increases in non-

parole periods, three-strikes legislation and ad hominem legislation (Freiberg 2000; 2016). The targeted offences are usually of a recidivist, sexual or violent nature with the perpetrator constructed as the dangerous criminal 'Other' who poses an ongoing threat to society (Freiberg 2000). Given this emphasis on 'risk' within sentencing in Australia, it is important to examine if actuarial discourses are present among the judiciary and if these are aiding decisions to sentence offenders to imprisonment. The present study investigates this through a CDA of recent judicial sentencing remarks from the NSW District Court in line with the research objectives.

3.2 Public Opinion and the Visibility of 'Justice'

The public voice in Australia has gained a new importance in penal policy over the last four decades, showing to be a strong driver of sentencing reform and sentencing outcomes (Frost 2010; Mackenzie 2005). Indeed, while many stages of the criminal justice process are reliant on the support of the public, including the co-operation from victims, witnesses and jurors, public confidence in the courts has become crucial for maintaining its legitimacy. Hall (2016) points out that sentencing must communicate the norms and boundaries of a society to ensure that the criminal justice system is not only just but is *seen* to be just. This means that public opinion is of fundamental importance in the process of sentencing.

Although the criminal justice process relies on public opinion, studies have shown that the public lack confidence with sentencing and are supportive of tougher sentencing. For example, it is generally believed that the courts are 'too lenient' on serious offenders and that judges are 'out of touch' with public views (Bartels, Fitzgerald & Freiberg 2018; Jones & Weatherburn 2010; Mackenzie et al. 2012; Roberts & Indermaur 2009; Warner et al. 2016). While knowledge of the facts of a case and deliberation with others on sentencing issues has

shown to moderate punitive views of sentencing (Lovegrove 2013; Stobbs, Mackenzie & Gelb 2014; Warner et al. 2011; Warner et al. 2017), other research has demonstrated that these effects are short-lived. The public generally revert back to their punitive attitudes over time (Indermaur et al. 2012; Mackenzie et al. 2014).

In addition to holding punitive attitudes, the Australian public generally hold inaccurate knowledge about crime and sentencing. Studies have shown that in times of decreasing crime rates, the public typically believe that crime is increasing and particularly for violent offences (Davis & Dossetor 2010; Roberts & Indermaur 2009). The public also greatly underestimate the conviction rate and the proportion of offenders imprisoned (Halstead 2015; Roberts & Indermaur 2009). Misperceptions in the rates of crime and in sentencing trends have also been found among the public in other Western nations under the punitive model, including the UK, USA, Canada and New Zealand (Mitchell & Roberts 2012; Roberts et al. 2002; Paulin, Searle & Knaggs 2003).

Given this pressure for the courts to align their views with the public, it is important to question the impact of public opinion on the judicial decision-making process. Indeed, the growing punitiveness in Australia and the rise of the public voice have increasingly brought penal authorities and judges under scrutiny. Judges are often accused of inconsistent sentencing, and courts are pressured to meet community expectations, be more 'in touch' with public opinion and to justify their role in decision-making (Freiberg 2000; 2016), This lack of trust further reinforces the need for the courts to show that 'justice' is not only being done but is *seen* to be done. By analysing recent judicial sentencing remarks, this project explores whether this visibility of 'justice' is influencing the decision to imprison offenders

in the NSW District Court. This will aid in meeting the project aim of how imprisonment in this context is being discursively constructed as an important crime control tool.

3.3 Changes in Judicial Powers

Due to the lack of confidence in the courts, the use and extent of judicial discretion in Australian sentencing has been put into question in recent years. In contrast with other Western nations, judges in Australia are not bound by recommendations or plea agreements but hold a large degree of discretion in determining sentencing outcomes (Freiberg 2016). Judges continue to operate on an 'instinctive synthesis' approach premised on the understanding 'that there is no single, correct objective sentence, nor some objective starting point… from which judges might commence the task of determining the sentence' (Freiberg 2010, p. 205). This means that judges need to engage in a balancing process where all the facts of a case are weighed, and sentences are tailored accordingly. However, this approach has been criticised on the grounds of inconsistency in sentencing and has seen the discretionary powers of the judiciary become restricted. This is seen in the introduction of the legislative reforms for 'community protection' that were mentioned above (Section 3.1) which have placed limits on sentencing decisions for specific offences.

Despite such restrictions, there is strong judicial resistance against punitive sentencing policies on the grounds that they are excessive, ineffective and unjust. Judges have argued that discretion is crucial for achieving 'just' and proportionate outcomes and that limitations on discretion can lead to disproportionate sentences (Mackenzie 2005; Warner, Davis & Cockburn (2017). Furthermore, such measures conflict with the fundamental sentencing principle of proportionality which prohibits judges from imposing unjust sentences that exceed 'that which is commensurate to the gravity of the crime that is being punished'

(Freiberg 2000, p. 59). Some judges have therefore been generally reluctant to sentence offenders harshly under punitive sentencing schemes that are designed to give most weight to the protection of the public rather than to the rights of the offender (Mackenzie 2005; Warner, Davis & Cockburn 2017). The present study will therefore examine, through a CDA of recent judicial sentencing remarks, if this reluctance is shared by judges in the NSW District Court.

3.4 Judicial Views on Sentencing Purposes

In the sentencing process, judges rely on sentencing purposes as the rationalities for directing and ultimately determining sentencing outcomes (Potas 2001). As mentioned in Chapter One (Section 1.3) and Chapter Two (Section 2.2.2), these are based on the varied and opposing aims of retributive and utilitarian punishment. However, as Warner, Davis and Cockburn (2017) point out, there has been no attempt to impose a rank of these purposes or select a general overarching purpose. The need to consider these purposes in sentencing is therefore a difficult task that requires judicial discretion in allocating their significance in individual cases.

Given this lack of guidelines regarding the prioritisation of purposes, it is important to question how judges view the purposes of sentencing. While no research has examined this process within the context of NSW, studies in other Australian jurisdictions and in the UK have shown that judges share specific views of sentencing purposes. For example, while judges view the utilitarian purposes of incapacitation and rehabilitation to be particularly important sentencing aims, general deterrence is considered to be the most important sentencing purpose even when judges doubt its efficacy (Mackenzie 2005; Millie, Tombs & Hough 2007; Tombs & Jagger 2006; Warner, Davis & Cockburn 2017; Warner et al. 2017).

In addition, retributive aims such as proportionality and denunciation are also perceived to be important but are viewed as supplementary purposes that apply in every case and therefore do not need to be regularly invoked in sentencing (Warner, Davis & Cockburn 2017; Warner et al. 2017).

In addition to holding certain preferences of sentencing purposes, judges have also been found to apply them differently depending on the circumstances of the case. For example, while general deterrence is viewed as the predominant sentencing purpose, judges often limit its application to offences that are of a dangerous, serious or particularly 'immoral' nature (Mackenzie 2005; Warner, Davis & Cockburn 2017; Warner et al. 2017). Likewise, incapacitation is only really viewed as important for sentencing 'dangerous' offenders that present an appreciable risk to the community (Mackenzie 2005; Millie, Tombs & Hough 2007; Tombs & Jagger 2006; Warner, Davis & Cockburn 2017; Warner et al. 2017). Furthermore, while rehabilitation is considered to be crucial for young offenders, it is not considered to be effective when sentencing offenders to imprisonment, as judges doubt the efficacy of treatment programs in custody and view imprisonment as criminogenic (Mackenzie 2005; Warner, Davis & Cockburn 2017). This project will build upon this existing literature by providing empirical evidence of judge's perceptions of the purposes of sentencing in the NSW context. This is important for understanding the rationales behind sentencing offenders to prison in a context that has the highest prisoner population in Australia (discussed in Chapter One).

As indicated above, an understanding of judicial views and application of different sentencing purposes is important for examining how judges justify their sentencing decisions. This is helpful for the current project, as very little is known about the role of sentencing

purposes in NSW and how judges navigate these when sentencing offenders specifically to imprisonment. Thus, to fill this research gap and aid in achieving the aim of this study, an objective of this project was to examine the judicial reasons for imposing a sentence of imprisonment on an offender, which includes investigating the sentencing purposes that judges draw upon to justify a sentence.

3.5 Discourses in Sentencing Practice

Much empirical investigation of criminal sentencing has sought to explain the overrepresentations of different groups within the criminal justice system by examining patterns in sentencing outcomes. In Australia, most of this work has focused on Indigenous populations and sentencing disparities across gender and offence category (Bond & Jeffries 2014; Deering & Mellor 2009; Jeffries & Bond 2012; Snowball & Weatherburn 2007; Thorburn & Weatherburn 2018). In other sentencing contexts such as the UK, USA, New Zealand and in parts of Europe, the focus has also been on offence category and on race, ethnicity, gender and age (Kramer 2016; Romain & Freiburger 2013; Wermink et al. 2015). While Anleu, Brewer and Mack (2016) point out that examination of sentencing patterns and outcomes cannot measure individual judicial attitudes, experiences and practices, they can, however, provide insights into the dominant discourses affecting sentencing practice, which is the focus of this study. A review of the key literature is therefore provided below.

3.5.1 Gender, Race, Ethnicity and Age

Quantitative studies in Australia, NZ and the US have shown that in the courts, female offenders are treated more leniently than males, receiving less custodial sentences and shorter custodial sentences on average (Deering & Mellor 2009; Jeffries & Bond 2010; Koons-Wit et

al. 2014; Thorburn & Weatherburn 2018). Scholars have suggested that this leniency is evidence of a dominant discourse of femininity in sentencing that constructs female offenders within traditional gender-role norms and a paternalistic-chivalry framework (Embry & Lyons 2012; Mann, Menih & Smith 2014). Indeed, studies have found that while women who commit 'masculine' crimes (such as homicide, sexual assault, robbery and drug offences are treated more harshly than women who commit 'feminine' crimes (such as non-violent crimes), they are still shown more leniency than males because of their perceived lack of agency and the need to be protected by the state from their social circumstances (Deering & Mellor 2009; Embry & Lyons 2012; Jeffries & Bond 2010; Koons-Wit et al. 2014; Mann, Menih & Smith 2014; Rodriguez, Curry & Lee 2006; Wiest & Duffy 2013). In contrast, male offenders have been constructed as rational and autonomous agents that intentionally seek gratification from their offending (Deering & Mellor 2009). This disparity between gender suggests that male offenders receive harsher punishment because they are seen by judges to be more blameworthy than their female counterparts. This supports a focal concerns perspective, which posits that sentencing decisions are influenced by perceptions of blameworthiness and risk (Steffensmeier, Ulmer & Kramer 1998).

Race and ethnicity have also shown to have a direct effect on judicial sentencing decisions. Quantitative studies in the USA have found that Black and Hispanic offenders receive harsher penalties and disproportionately more prison sentences than their White counterparts (Koons-Wit et al. 2014; Nellis 2016; Rehavi & Starr 2014). Australian research has similarly demonstrated that Indigenous offenders are more likely to receive a prison sentence and receive harsher sentences than non-Indigenous offenders (Bond & Jeffries 2014; Jeffries & Bond 2012; 2014; Thorburn & Weatherburn 2018). However, there is a growing body of literature showing that Indigenous offenders receive more lenient sentences than non-

Indigenous offenders (Bond & Jeffries 2010; 2011a; Bond, Jeffries & Weatherburn 2011; Jeffries & Bond 2013). Yet, scholars have argued that this is due to a view of Indigeneity as problematic, arguing that this group is 'deficient' and 'dysfunctional' (Jeffries & Bond 2010; Windsor 2014). Such views of ethnicity in the USA and in Australia can therefore be seen to reinforce negative constructions of such groups that justify the use of State intervention via imprisonment or other crime control means.

Age is also another important factor in sentencing decisions because it is likely to affect attributions of culpability, dangerousness and community risk (Wermink et al. 2015). In the USA, youth has found to intersect with gender and ethnicity, leading to harsher sentencing outcomes (Freiburger & Hilinksi 2009; Leiber et al. 2018; Rehavi & Starr 2014; Steffensmeier, Painter-Davis & Ulmer 2017). In contrast, youth has shown to reduce the likelihood of receiving a sentence of imprisonment in Australia and in Europe (Bond, Jeffries & Weatherburn 2011; Wermink et al. 2015). These latter findings align with the idea in sentencing that youth is an indicator of immaturity and good rehabilitation prospects (Bagaric, Edney & Alexander 2018). However, other studies have found that older offenders receive more lenient sentences than younger offenders (Blowers & Doerner 2013; Wermink et al. 2015), though this is likely based on perceptions of culpability around their physical condition rather than their moral maturity. The findings of this project contribute to this body of research. As discussed in Chapter Six and Seven, constructions of gender, race, ethnicity and age in the NSW District Court did affect judgements of blameworthiness, though this did not deter judges from imposing a sentence of imprisonment.

3.5.2 Character of Offender and Offence Type

Previous criminal convictions and drug dependency are considered to be a good indicator of an offender's risk of reoffending and their rehabilitation prospects, and can therefore affect sentencing decisions (Bagaric, Edney & Alexander 2018). However, studies have found that these factors can lead to harsher sentencing practices. For example, in Tombs and Jagger (2006) and Millie, Tombs & Hough's (2007) study on sentencers in the UK, judges pointed out that offenders with criminal histories were more likely to receive a sentence of imprisonment than offenders with no criminal history, even for relatively minor offences. This decision was based on the premise that there was no other alternative but to incarcerate offenders that continue to pose a risk to the community (Tombs & Jagger 2006; Millie, Tombs & Hough 2007). Research in Australia and in Europe have similarly shown that previous convictions are a strong predictor of the decision to imprison and of the length of term, and that drug dependency is a strong indicator of risk of reoffending (Bond & Jeffries 2011b; Warner et al. 2018; Wermink et al. 2015).

Sentencing research also indicates that judges hold particular perceptions of offences and offenders that serve to mitigate or aggravate the sentencing outcome. For example, research on the sentencing outcomes of child sex offenders have found that judges perceive such offences to require severe sanctions such as imprisonment, and that offences involving younger victims should receive longer penalties of imprisonment than if the victim was older (Deering & Mellor 2009; Mackenzie 2005; Lewis, Klettke & Day 2014). In contrast, domestic violence offences have shown to reduce sentences when compared with non-domestic assault (Bond & Jeffries 2014; Kramer 2016) but increase sentences for Indigenous offenders (Jeffries & Bond 2014; Thorburn & Weatherburn 2018). While the focus of this project is not to examine disparities in sentences of imprisonment, it does investigate whether

judges in the NSW District Court are using similar discourses of blameworthiness or risk justify a sentence of imprisonment. Examination of judicial sentencing will therefore involve analysis of the roles that previous convictions, drug dependency, and offence type play in this decision.

3.6 Conclusion

By way of providing scholarly context for the present study, this chapter has given an overview of the factors influencing the use of tougher sentencing in Australia. These developments have included the pervasive influence of a punitive rhetoric supported by populist policies, public opinion and an erosion of judicial discretion. The literature on the factors influencing judicial sentencing practices has included both ends of a wide spectrum, with judges often relying on specific purposes of sentencing and perceptions of blameworthiness and risk when justifying their sentences. This review therefore highlighted the need to investigate the impact of dominant discourses on sentencing practices. This project draws upon this existing literature to achieve the research aim of examining how imprisonment is being discursively constructed in the NSW District Court. As much of the sentencing research in this area has been quantitative and has not been conducted in the NSW context, this study seeks to provide deeper insight into the complexities inherent in judicial decision-making within NSW and empirical evidence of the discourses perpetuating the sentencing practice of imprisonment.

4 Methodology

This chapter outlines the methodology that was used to address the research aim and objectives of this project. It begins by providing an overview of the linguistic and sociological study of language, meaning and discourse to provide a backdrop for the critical discourse analysis approach used in this study. The theoretical foundations of this approach are then reviewed, followed by a discussion of judicial sentencing remarks as discourse. The following sections detail the data collection process and the coding framework. The focus of this project was on criminal law, and the data collected were sentencing remarks from the NSW District Courts of cases that included a sentence of imprisonment. An overview of Fairclough's (1992) three-dimensional framework of discourse is then provided as the analytical method guiding the critical discourse analysis of judicial sentencing remarks that is presented in Chapters Five to Seven.

4.1 The Study of Language as Discourse

Since the 'linguistic turn' of the early twentieth-century, language has come to be understood no longer as a medium for expression but a system that constitutes meaningfulness in its own terms (Locke 2004). In other words, rather than comprising an eternal, absolute or fixed reality, meaning is now recognised as constructed and historically and culturally situated through the use of language and other sign systems (Locke 2004). Peter Berger and Thomas Luckmann's theory of social constructionism, which was introduced in Chapter Two (Section 2.3.1), has been influential in studies of language and its role in meaning-making. Constructions of reality are argued to be maintained through systems of signification (such as language) that reinforce particular moral codes and social norms about the world. By

identifying some features of social life as significant and distinguishing those features from others, human interactions construct and legitimise specific representations of reality that are internalised as having a 'real' and concrete existence (Henry 2009).

This practice of 'meaning-making' is closely linked to the concept of discourse. Discourse is a term that is commonly defined as language in use (i.e. written or spoken texts) and has attracted varied meanings across different disciplinary and theoretical standpoints (see for example, Fairclough 1992). However, critical social theory uses the term 'discourse' to describe the social practices that written or spoken texts perform (Fairclough 1992). Such practices have been referred to as 'sense-making stories' (Locke 2004, p. 5) that draw on already known stories in the wider social context that are recognisable as 'commonsense'. These stories or discourses therefore become the unconscious effect of 'everyday, textual work of persuasion, dissimulation and manipulation that sets out to change the minds of others in one's own interests' (van Dijk, cited in Locke 2004, p. 32).

This critical understanding of language draws on Michel Foucault's concept of power. Foucault (1972) argues that because knowledge about the world is produced through repetitive utterances (discourses), discourse is inextricably linked to power. Power produces the domains of possibility and ways of knowing, and discourses exercise and give legitimation to this power through producing 'the domains of objects and rituals of truth' (Foucault 1995, p. 194). These 'truths' about the world set boundaries around what is true and false, what is good and bad, and what can and cannot be said in particular social domains (Foucault 1972). However, if meaning is historically and culturally situated, such 'truths' about the world necessarily need to be questioned and contextualised within their discursive

processes. The present study heeds this call by examining the 'truth' claims or discourses of the judiciary when sentencing an offender to imprisonment in the NSW District Courts.

4.2 The Critical Analysis of Discourse

The critical approach to analysing discourse is commonly referred to as 'critical discourse analysis' (CDA). CDA is not a uniform methodology but combines various analytic traditions to examine the discursive characteristics of a text (Fairclough, Mulderrig & Wodak 2011). Norman Fairclough, a linguist and one of the founders of CDA, describes the focus of this approach as:

> … [aiming] to systematically explore often opaque relationships of causality and determination between (a) discursive practices, events, and texts, and (b) wider social and cultural structures, relations and processes; to investigate how such practices, events and texts arise out of and are ideologically shaped by relations of power and struggles over power (Fairclough 1995, p. 132).

Fairclough points out that CDA goes beyond mere description of texts to interrogating the role of power and ideologies in the shaping of systems of knowledge, social structures, practices and identities. Ideologies are defined as socially shared beliefs systems that control and organise other socially shared beliefs and which 'contribute to establishing, maintaining and changing social relations of power, domination and exploitation' (Fairclough 2003, p. 9; van Dijk 2006). Central to this understanding of ideology is Antonio Gramsci's concept of hegemony, which refers to how ruling classes persuade and construct alliances with subordinate classes to accept their own moral, political and cultural values through concessions or ideological means (Fairclough 1992; Mayr 2004). This consensus is secured through discourses that position the reader or listener of a text to subscribe to these ideologies (Locke 2004).

CDA thus views power and ideologies as exercised and legitimised subtly and routinely (i.e. not coercively) through texts (Fairclough 1992). However, linguist and CDA scholar van Dijk (2006) argues that because ideologies are gradually developed by social groups, they can therefore be gradually disintegrated if members of a social group reject that ideology. A CDA approach therefore views discourse not only as constitutive and reproductive of dominance but as able to challenge the prevailing social order that privileges certain social groups over others (van Dijk 1993).

According to Locke (2004), the 'critical' aspect of CDA is found in its ability to highlight, challenge and address the social implications of discourse and expose the often hidden ideologies which sustain inequalities. CDA does not primarily aim to contribute to a specific discipline or discourse theory, but to better understand pressing social issues through a moral and political lens and through contributing to change, particularly in the area of social justice (Fairclough 2003; van Dijk 1993). For these reasons, a CDA of recent judicial sentencing remarks in the NSW District Courts was adopted for this project to examine how the sentencing practice of imprisonment is socially constructed and subsequently legitimised by the courts. The courts are an institution of authority and power, both shaped by and shaping public discourse and opinion (Coyle 2013). As discussed in Chapters One (Section 1.4) and Two (Section 2.3), it is crucial to examine the way language is used in the courts, given that imprisonment is a pain-inflicting practice that increases recidivism and is disproportionately applied among the socially and economically vulnerable.

4.2.1 Sentencing Remarks as Discourse

According to Hall (2016, p. 94), sentencing is a value-laden process that operates as a powerful public expression of the norms and boundaries of a society and is where justice is

seen to be done. A sentence therefore represents a symbolic and collective statement about punishing behaviour that encroaches on a society's basic code of values. Judgements are not only made on what punishment an offender should receive, but also on what constitutes a harm, how criminal conduct should be denounced, what behaviours need to be deterred, and what the appropriate punishment should be in the circumstances of the case (Sullivan 2017, p. 413).

Judges provide explanations for their sentencing judgements during the sentencing hearing to clarify their decisions. These explanations are known as judicial sentencing remarks and are usually given orally and then transcribed for public access (NSW Sentencing Council 2017). According to the Sentencing Advisory Council (2019), sentencing remarks follow a general 'template' in terms of what needs to be included. These are a summary of the offence, including the aggravating and mitigating factors; relevant facts about the offender, including his or her background and prospects of rehabilitation; reference to the impact of the victim(s); and reference to the purpose(s) of sentencing that the sentence achieves. Sentencing remarks are thought to help the offender understand their sentence, help the community to understand the process of sentencing and to promote consistency in sentencing.

Given that the sentencing process relies on value judgements and follows a specific set of 'rules', sentencing remarks are important discourses to examine when investigating meaning about crime and justice. Inherent in the court system are hierarchies of power, where judges are the 'moral entrepreneurs' and 'public discourse leaders' (Coyle 2013, p. 59), and where offenders are passive recipients of a unidirectional monologue directed by the judge (Heffer 2005). With sentencing being intrinsically linked to power, judicial sentencing remarks are

important sources of data for providing insight into the ways that language on imprisonment, the most severe sentencing option in Australia, creates and reflects power relations.

4.3 Data Source

The study reported in these thesis analysed judicial sentencing remarks that involved a sentence of incarceration in the year of 2017. The sentencing remarks were limited to criminal cases in the District Court of NSW to provide a comprehensive and diverse data set for this project. As detailed in Chapter One (Section 1.2), the NSW District Court is the largest trial court in Australia whose criminal jurisdiction deals with the majority of criminal offences (NSW District Court 2018). While other research has focused on the discursive constructions of victims and offenders of serious crimes in the Supreme Courts of Australia (see for example, Jeffries & Bond 2010; Peters 2002; Sullivan 2017), this project is concerned with the more routine crimes that make up the bulk of sentences of imprisonment in NSW.

Purposive sampling was used to search the *NSW Caselaw* database for the judicial sentencing remarks. Cases were identified using advanced searches grouped around terms known to be synonyms for a prison sentence (‘imprisonment’, ‘incarceration, ‘prison’), the date range of 1 January 2017 to 31 December 2017, and by selecting the ‘District Court’. The terms were searched separately to increase the number of results found, and civil cases were omitted by applying the catch phrase ‘criminal law’. Cases that were adjourned, did not involve a sentence of imprisonment, or that dealt with young offenders were also removed manually. This resulted in a final set of 109 sentencing reports to be analysed. This method of data collection was considered to be the most effective way of obtaining all remarks that included

a sentence of imprisonment, though it is acknowledged that through using different search tools, some remarks may have been missed.

4.4 Data Collection: Qualitative Thematic Coding

The use of *Nvivo*, a computer-assisted qualitative data analysis software program, aided the initial analysis of the sentencing remarks. This software allowed the efficient and accurate importation, assembly, coding, categorisation and retrieval of the data for analytical purposes (Zamawe 2015). To maximise consistency in data collection (coding), the coding procedure was conducted by one coder, the researcher. The coding procedure was then peer reviewed to ensure the reliability and validity of the data and to ensure that the application of coding categories was thorough, consistent and logical. In particular, the coding framework was reviewed for its overall consistency with the aim and objectives of this project, and the text excerpts were compared for their consistency with their prescribed code. Lastly, the coding of manifest and latent data allowed an initial analysis of constructions of imprisonment, crimes and criminals which were overt, as well as an analysis of the contexts and meanings of such constructions. Conducting this initial thematic analysis allowed the researcher to synthesise the vast amount of text into manageable and meaningful categories for CDA.

4.4.1 Latent Content

Each sentencing remark was coded for latent content based on the three objectives of this project. The results were grouped into four distinct but overlapping themes including: constructions of imprisonment, sentence justifications, constructions of ‘crime’ and constructions of ‘criminals’. Coding of the content under these themes were separated into various sub-themes or categories and were determined by coding criteria (see Appendices)

which was amended throughout the coding procedure as new categories were identified. An overview of the thematic coding procedure is provided below.

The first theme identified in the coding of the latent data included the determination of constructions of imprisonment. The data were organised into eleven themes that were coded as: ‘Criminogenic’, ‘Counterproductive, ‘Institutionalising’, ‘Harmful’, ‘Inappropriate’, ‘Deterrent’, ‘Form of Denunciation’, ‘Just’, ‘Rehabilitative’, ‘Last Resort’, and ‘Necessary’ (see Table 1). In addition to these specific codes, each sentencing remark was given an overall tenor which was judged as either ‘negative’, ‘positive’, ‘neutral’, or ‘mixed’. For example, based on the coding criteria, if imprisonment was portrayed as counterproductive to offender’s rehabilitation, the remark was deemed ‘negative’. Alternatively, if imprisonment was portrayed as an effective place of rehabilitation, the remark was deemed ‘positive’. A ‘neutral’ tenor was ascribed to remarks that portrayed imprisonment as neither negative nor positive, and a ‘mixed’ tenor was given to remarks that portrayed imprisonment in both a negative and positive light.

Latent coding also included identification of sentence justifications, which were the second theme. Eight reasons or themes were identified and were coded as: ‘Accountability’, ‘Adequate Punishment’, ‘Community Protection/Incapacitation’, ‘Denunciation’, ‘General Deterrence’, ‘Recognition of Harm’, ‘Rehabilitation’ and ‘Specific Deterrence’ (see Table 2). These categories were coded in line with judicial references to the purposes of sentencing under section 3A of the Act and to comments about the sentence that appeared retributive or utilitarian in nature.

The third and fourth theme identified by the latent coding procedure included social constructions of ‘crime’ and ‘criminals’. The data coded for social constructions of crime were distributed among five categories, including: ‘Harmful’, ‘Deviant’, ‘Immoral’, ‘Social Problem’ and ‘Unlawful Conduct’ (see Table 3). Coding of these categories were determined by how judges described the nature and impact of criminal behaviour on victims and the community. In addition, the data coded for social constructions of ‘criminals’ was organised under seven categories. These included: ‘Dangerous’, ‘Deserving’, ‘Disadvantaged’, ‘Disobedient/ Disrespectful’, ‘Immoral’ and ‘Morally Culpable’ (see Table 4). Coding of these themes was concerned with the language used by judges to describe individual offenders.

4.4.2 Manifest Content

Each sentencing remark was coded for demographic information (manifest content) using a *Microsoft Excel* spreadsheet. This included the case number, head sentence, offence, gender, age and ethnicity of offender (see Table 5). Coding of this information was undertaken for ease of later crosstabulations during the analysis stage to draw connections between the latent data and manifest data.

Offences in these cases were varied, with most relating to: (aggravated) break and enter, (armed) robbery (in company), cultivate/manufacture/import/supply prohibited drug, import and possess firearms, money laundering, car-rebirthing, (aggravated) assault, (aggravated) indecent assault, grooming, possess child abuse material, unlawful sexual intercourse and rape. Other offences included: dangerous driving, driving whilst disqualified, (identity) fraud, people smuggling, inmate escape from custody and accessing terrorist propaganda material.

Both judges and offenders in the cases analysed in this study were primarily male. The age of offenders varied, ranging from 18 to 79 years. Analysis of the judicial sentencing remarks revealed that the ethnicity of offenders was varied and included those who were: Indigenous/Aboriginal, Maori, Kiwi, British, Swiss, Afghan (or Arab), Syrian, Lebanese, Tanzanian, Vietnamese, Taiwanese, Maltese, South Korean, Chinese, Thai, Argentinian, Colombian, Fijian, Malaysian, Mexican, Nigerian and Russian. An offender's ethnicity was usually mentioned by judges when discussing the background of an offender (in terms of their place of birth or their cultural heritage), though it was not always disclosed.

4.5 Data Analysis

The specific method used for the data analysis of this project was based on Norman Fairclough's approach to CDA. Fairclough's (1992, Figure 1) framework involves analysing discourse at three distinguished but interrelated levels: (1) text, (2) discursive practices and (3) social practices.

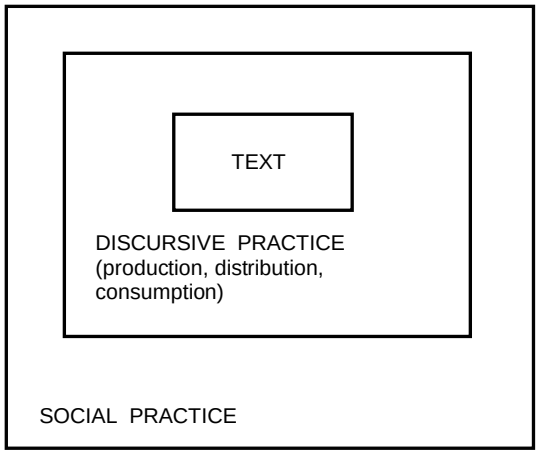

Figure 1. Fairclough's three-dimensional conception of discourse (adapted from Fairclough 1992, p. 73)

(1) Text

Analysis at the level of the text focuses on the lexical and structural features of a text and how they achieve their intended effect on an audience (Fairclough 1992). This includes analysis of individual words (vocabulary), how groups of words are combined into clauses and sentences (grammar), how sentences are linked together through certain vocabulary and repeated words to form larger groups of texts (cohesion) and the larger-scale organisation properties of a text (text structure). Analysing these four textual features can reveal how a text constructs particular social identities, relationships, knowledge and beliefs, including what is made explicit and implicit in a text, such as binary oppositions (see Locke 2004, p. 59). This is of central importance to CDA, as '[w]hat is 'said' in a text always rests upon 'unsaid' assumptions' (Fairclough 2003, p. 11). The current study focuses specifically on the textual features of vocabulary and cohesion.

(2) Discursive Practice

The analysis of discursive practice is concerned with the interpretation of a text (Fairclough 1992). This includes analysis of how the text was produced and who it was produced by (text production). These aspects reveal how texts are produced in specific ways and in specific social contexts, whose voices are included and whose are excluded, as well as who is responsible for the wording and whose position is represented by the text. As indicated above, there are hierarches of power embedded in the court system. Therefore, judicial sentencing remarks can be seen to have the specific purpose of reinforcing the authority of the courts and of the 'law', with power (i.e. voice) given only to those with authority (i.e. the judge and not the offender).

Discursive practice also involves analysis of the ways in which a text is received, read, interpreted and used (consumption of texts), as well as how it is distributed (text dissemination) (Fairclough 1992). Because texts are interpreted differently across different social contexts, it is important to identify the institutional positions, knowledge, expectations and values of the targeted audience and how the text creates meaning beyond its initial instance (Fairclough 2003). This links to text production, as sentencing remarks are created for a specific audience at the time of sentencing (i.e. the offender, legal teams, others present in court) and then distributed for public access to those who are interested (usually not the general public). Furthermore, this analysis demonstrates how sentencing discourse has an ongoing legacy outside the walls of the courtroom.

(3) Social Practice

This level of analysis asks the question of whose interests are at stake in representing things in a certain way (Fairclough 2003). Social practices refer to the ways that certain structural possibilities (e.g. economic structure, a social class, or a language) are included or excluded through texts. Examples of social practices can include class composition and the organisation of power relations and practices in different institutions (Fairclough 1992). Ultimately, this analysis focuses on the immediate situation that has given rise to a texts' production and whether it supports a particular ideology (Fairclough 2003). While judicial sentencing remarks are a particular instance of discourse that can be seen as serving the interests of the community to deal with those who transgress the moral boundaries of a society, this ultimately can be seen to legitimate the interests of the State to exercise authority in punishing offenders and defining such moral boundaries (see Scott 2018). Norman Fairclough's three-dimensional approach of CDA therefore provides a helpful guiding

framework for examining the ways in which imprisonment is socially constructed and its practice legitimised through judicial sentencing remarks.

4.5.1 Limitations of CDA

As with any research method, there are a number of limitations in engaging in a CDA. First, Fairclough (2003) points out that discourse analysts need to understand that there is no such thing as 'objective' analysis. Qualitative analyses are inevitably selective and subjective as researchers are driven by particular motivations, asking some questions and not others. Like any discourse, meaning that is derived from judicial sentencing remarks is contingent upon the position of the reader. Texts are also open to diverse interpretations and some are more transparent than others, which means that no analysis of a text is complete and definitive. Therefore, while researchers can gain some knowledge of its meaning, it is impossible to know all that there is in a text.

Secondly, it is important to recognise that social agents such as the judiciary are not totally 'free' agents but are socially constrained by the social structures and practices within the legal institution (Fairclough 2003). Yet agents do have a degree of freedom to set up the relations between elements of texts, such as the combination of certain words and expressions in judicial sentencing remarks. Any analysis of discourse must therefore be careful not to reduce social agents to being completely socially determined, nor as totally free.

Lastly, and perhaps most importantly, it is pivotal to acknowledge that any discursive analysis is itself a form of discourse. As aforementioned, texts have ideological effects of representing the world in specific ways that contribute to establishing, maintaining and changing relations of power and domination between social groups (Fairclough 2003). While

it is the hope of this project to investigate power relations that legitimise the practice of imprisonment, it is acknowledged that this thesis is a discourse that reinforces specific representations of crime and justice. Due to the nature and limitations of CDA, it is not necessary to develop a 'one-fits-all' approach to analysing texts but to adopt different approaches as resources to be adjusted to fit the individual project. The approach of CDA is therefore used as a guideline rather than as a 'blueprint' for the data analysis of this project.

4.6 Conclusion

This chapter has provided a detailed description of the research approach that underpinned the data analysis for this project. The critical social study of language was outlined as a backdrop for the theoretical framework of CDA employed in this study. As a method for analysing language and disrupting dominant discourses that reinforce unequal power relations, CDA was positioned as an appropriate method for this project in examining the legitimation of imprisonment in NSW judicial sentencing remarks. The CDA conducted for this research was grounded in Norman Fairclough's three dimensional concept of discourse. Qualitative thematic coding via *Nvivo* was employed to aid the data analysis in finding common themes and patterns across the judicial sentencing remarks, which were divided into their manifest and latent content. This methodology aimed to be comprehensive and rigorous in order to maximise the validity of the data and reliability of the findings which are presented and discussed in the following chapters.

5 Imprisonment as 'Punishment'

This chapter is the first of three that investigates, via the CDA of recent sentencing remarks, how imprisonment was legitimised as an important form of crime control in the NSW District Courts in 2017. In this chapter, the ways in which concessions to 'justice' and 'morality' legitimised imprisonment as a punishment tool will be examined. This served to reinforce the judge's authority as a 'moral entrepreneur' (Coyle 2013, p. 59) and to persuade the offender and community of the retributive value of imprisonment. Analyses in this chapter will also indicate that imprisonment was viewed as a means for achieving specific purposes of sentencing under the *Act* that privileged the rights of the community over the offender. These included imprisonment as a deserved sentence for morally culpable offenders and as serving the community through incapacitation, deterrence and denunciation. However, prison was seen primarily as a means of punishment and thus an important tool for ensuring the first purpose of sentencing under the *Act* was met.

5.1 Prison as a Punishment Tool

The first objective of this study was to examine judicial constructions of imprisonment and the justifications for imposing a sentence of imprisonment on an offender. The reasons that a judge may impose a sentence on an offender in NSW under the *Act* were outlined in Chapter One (Section 1.3). In accordance with this objective and the first purpose of sentencing, CDA of the judicial sentencing remarks revealed that judges constructed imprisonment as a primary means of achieving 'punishment'. For example, in the following excerpt of sentencing remarks from a case in which the offender was sentenced to five years' imprisonment for supplying a commercial quantity of cocaine, the judge stated:

> Ultimately however he has to be punished for what he has done. It is a serious matter to carry a large commercial quantity of drugs from one place to another. It is a serious matter to engage in such behaviour over a considerable period of time without reflecting on the seriousness of it and abandoning what was planned *(R v Laratta [2017] NSWDC 227*, para. 18).

In this statement, it can be clearly seen that the need for punishment is the deciding factor to imprison the offender. This is justified through the repeated claim that his conduct was 'serious' and thus a punishment of equal seriousness is warranted. This reference to the retributive principle of 'just deserts' (detailed in Chapter Two, Section 2.2.1) successfully constructs prison as a key mechanism for ensuring that 'justice' is achieved via adequate punishment for the offender and holding him to account for his actions.
making them accountable for their actions.

In accordance with the views of judges found in previous studies in Australia and the UK (Mackenzie 2005; Tombs & Jagger 2006; Millie, Tombs & Hough 2007), this notion of 'just deserts' was seen to be rooted in the sentencing principle of 'last resort', which is reflected in section 5 (1) of the *Act*. As discussed in Chapter One (Section 1.3.1), this is the idea that a term of imprisonment should only be imposed if there are no other alternative sanctions available. The view that prison was the only option was explicitly voiced by one judge who sentenced an offender to nine years' imprisonment for the importation of the commercial quantity of cocaine:

> I have had regard to section 17A(1) of the Act and I am satisfied that after having considered all other available sentences that no other sentence other than a sentence of imprisonment is appropriate in all the circumstances of this case (*R v Cressel [2017] NSWDC 272*, para. 1).

Likewise, in a case of serious assault with a weapon, one judge stated that: 'The case in my view does not allow for consideration of non-custodial options' (*R v Pires [2017] NSWDC*

341, para. 2). While the offences in these cases are varied, their perceived 'seriousness' can again be seen to legitimise the use of imprisonment as a punishment, as well as to create the condition for it to be seen as the only 'appropriate' sentence. Judges in the UK have similarly reported that prison is often used a last resort because the seriousness of offences does not allow for a lesser sentence (Millie, Tombs & Hough 2007; Tombs & Hough 2006). This unavoidability of a prison sentence can therefore be seen to reinforce its use as a 'punishment' tool in the UK and in NSW District Court and thus aid in its legitimation as an important form of crime control.

In accordance with retributive theory that states society has a moral obligation to punish culpable offenders (Moore 2009), analysis revealed that judges similarly viewed the task of punishing to be a 'duty'. This 'duty' was explicitly referred to by one judge who sentenced a drug trafficker to three years and nine months' imprisonment:

> The reasons for this decision [of imprisonment] are that… the subjective considerations relating to the offender are necessarily subsidiary to the duty of the Court to ensure that he is given a punishment of appropriate severity (*R v Vella [2017] NSWDC 355*, para. 1).

In claiming that 'just deserts' is an essential feature of sentencing, this statement can be seen to reinforce the inevitable and unequivocal 'reality' of imprisonment as an important tool for punishing offenders. Thus, what is being said about sentencing as a 'duty' is resting on the 'unsaid assumption' (Fairclough 2003, p. 11) that an 'appropriate' punishment is only attainable by those with the power and authority (i.e. the courts) to determine what is a 'just' and 'unjust' punishment. To ensure that an appropriate punishment was reached, part of this 'duty' involved making assessments of offenders' moral culpability. This was evident in the

following excerpt, where the 'criminality' of the offender and the 'objective gravity' of the offending was viewed to equal a 'significant' prison sentence:

> Ultimately I have to impose a sentence on the offender which reflects the objective gravity of his conduct. In each case his criminality was significant. It is a serious matter to be a street level dealer of drug suppling as often as the offender did and it is a serious matter to use a sawn off shotgun to fire at a car without even checking whether that car was occupied. In order to reflect the objective gravity of the offender's misconduct he must spend a significant time in gaol (*R v Kirk [2017] NSWDC 195*, para. 26-27).

In this statement, imprisonment can be seen to be portrayed as a 'just' punishment through the judges' assessment of the offender's moral culpability. The belief culpability can be 'objectively' measured, and that the offender 'must' necessarily receive a long prison sentence clearly shows the authority of the judge as a 'moral entrepreneur' and a 'public discourse leader' (Coyle 2013, p. 59) in constructing knowledge of justice. Such statements can therefore be seen to reinforce the State's authority in exercising and defining knowledge about 'justice' through punishing offenders via a sentence of imprisonment.

5.2 Prison as 'Just' Punishment for the Community

The emphasis on retributive justice in the above section may provide evidence for the pressure on judges to legitimise their role in sentencing and ensure that justice is being seen to be done (Freiberg 2000; 2016). Indeed, analysis revealed that the courts prioritised this visibility of justice by claiming that the 'duty' of sentencing was foremost concerned with achieving justice and safety for the community. Imprisonment was thus constructed as the ultimate tool to fulfil this two-fold purpose, with one judge stating that: 'A court's ultimate duty is to do what it can to ensure community protection. It can only do so by ensuring that the offender is adequately punished for the offence' (*R v Mead [2017] NSWDC 1*, para. 1). This was similarly voiced by another judge regarding an offender sentenced to four years'

imprisonment for committing fraud: 'The Court must impose adequate punishment… [and the] sentence must reflect both justice to the offender but also the community' (*R v Miles [2017] NSWDC 411*, para. 22). Following the discussions in Chapter Two and Three, such statements can be seen to be shaped by a punitive framework of 'justice' where community expectations of tough sentencing are prioritised. It can also be suggested that similarly to judges in Victoria and Queensland, judges in NSW are viewing some purposes of sentencing as more important than others (Mackenzie 2005; Warner, Davis & Cockburn 2017; Warner et al. 2017). Indeed, community protection was voiced to be the most 'fundamental purpose of punishment', as evidenced in the following comment regarding an offender sentenced to eight years' imprisonment for armed robbery:

> Any sentence imposed must reflect all the circumstances of the offence including its objective seriousness… as well as the fundamental purpose of punishment, that is, the protection of society (*R v Buchanaan [2017] NSWDC 406*, para. 4).

According to this statement, the sentence given to the offender is not only 'just' because it is proportionate to the offence, but because it safeguards the community. This representation of imprisonment can therefore be seen to privilege the rights of the community over what may be best for the offender, who is portrayed as 'different' to 'normal' people (further discussed in Chapter Six). From a penal abolitionist perspective this stance is problematic, as imprisonment has shown to lead to further offending and the further marginalisation of offenders (as discussed in Chapter One, Section 1.4). Such effects of prison can therefore not be seen to facilitate the protection of the community but to create more harm and danger. Thus, it can be suggested that judges in the NSW District Court are legitimising punishment as a punishment tool to boost the visibility of 'justice' rather than ensuring that just outcomes are met for the offender. In addition, this statement shows how hegemonic identities and

relations are exercised and legitimised subtly and routinely through texts like judicial sentencing remarks (Fairclough 1992; Mayr 2004).

In addition to the construction of imprisonment as punishment, it was also evident that imprisonment was constructed as an important avenue for rehabilitation, as found in previous studies (see Mackenzie 2005). The sentencing remarks indicated that the rehabilitative potential of imprisonment not only benefits the offender: 'his [the offender's] time in custody has been a salutary experience and that may operate to prevent him from offending in the future' (*R v Allouche [2017] NSWDC 283*, para. 48), but also functions to offer community protection against further reoffending:

> …the need to assist Mr Makhlouta does not arise only from the need to assist him to enjoy life in the community, it primarily arises from a need to do as much as can be done to stop Mr Makhlouta harming people in the future (*R v Makhlouta [2017] NSWDC 164*, para. 11).

It is clear in these excerpts that the avoidance of future harm to the community, rather than the need to help the offender to resume a 'moral' life, is of primary importance to the 'job' of sentencing. The literature documenting the criminogenic nature of prison (as discussed in Chapter One, Section 1.4) suggests that this belief of prison as protecting the community is rooted in the visibility of justice rather than in its actual utility to achieve this aim. Thus, as Scott (2018) suggests, the prison is revealed to be characterised by a view of punishment that legitimises State violence and control of offenders, but which is cloaked in a rhetoric of reform and safety.

Similar to the findings of Mackenzie (2005), Warner, Davis and Cockburn (2017) and Warner et al. (2017), analysis showed that judges in the NSW District Court also prioritised

the purpose of general deterrence when handing down sentences of imprisonment. While judges often highlighted to the need to deter individual offenders, imprisonment was viewed to be more effective in deterring potential criminals in the broader community. This preference may reflect an awareness of the recidivist effect of prison on offenders (BOCSAR 2019c; Gelb, Fisher & Hudson 2013; Weatherburn 2010) and an adherence to the utilitarian belief that people are deterred from offending through fear of punishment. Indeed, imprisonment as a 'threat' to the broader population (and thus a crime-control tool) was constantly voiced by judges:

> The purposes of sending people to gaol when they have committed criminal offences are varied. In almost all cases general deterrence is important. Those who might be tempted to offend in the same way an offender has are hopefully deterred from doing so by the prospect of severe punishment (*R v Marks [2017] NSWDC 23*, para. 1).

A similar comment was made regarding an offender sentenced to four years' imprisonment for indecent child sexual assault:

> The reasons that significant, and sometimes even harsh, sentences are imposed on those who commit sexual offences upon children are well known. One of the most important reasons involves the principle of general deterrence. Children are vulnerable to the exploitation of adults. They need to be protected from predatory behaviour (*R v P [2017] NSWDC 84*, para. 1).

By claiming to know the reasons for why people choose to obey the law (i.e. through the prospect of severe punishment) and what constitutes a just punishment for those who disobey it (i.e. a significant and harsh sentence), these excerpts further reinforce the judge as having supreme authority as a 'moral entrepreneur' (Coyle 2013, p. 59). In addition, these texts imply that decisions made in the courtroom will impact social ideologies, values and actions within the broader community, with the judge positioned as shaper of 'justice' and individual choice and actions outside the courtroom.

In accordance with previous literature (Mackenzie 2005; Robinson 2008), the above statement in *R v P [2017] NSWDC 84* also reveals that the judge, as shaper of 'morality', is established via the rhetoric of denunciation. For example, child sex offenders are constructed to be *deserving* of 'significant' and 'harsh' sentences because of their *immoral*, 'predatory behaviour' towards the 'vulnerable'. A more specific reference to the moral nature of punishment was voiced in a case involving indecent assault: 'one must… denounce this conduct, which is so rightly condemned by the community' (*R v Sullivan [2017] NSWDC 219*, para. 25). In this statement, the judge can be seen to claim to know what the community is thinking in terms of their 'right' to denunciation. The 'duty' of the court to enable the community to do so reveals the hegemonic nature of judicial sentencing remarks in persuading the offender and the community to accept the court's own moral, political and cultural values of what 'justice' should entail. This process of domination and meaning-making is often achieved through dominant discourses (Fairclough 1992; Locke 2004; Mayr 2004).

5.3 Conclusion

In accordance with the aims and objectives of this project, this chapter demonstrated that judges in the NSW District Court constructed imprisonment as a 'punishment' tool by drawing on dominant ideas of 'justice' and 'morality. CDA of the judicial sentencing remarks found that judges held mostly retributive ideas of justice and assumed knowledge of the views and needs of the community and prioritised these over those of the offender. Judges prioritised the need for adequate punishment, as well as community protection through deterrence and rehabilitation and the public 'right' to denunciation. Thus, imprisonment was represented as a necessary punishment for ensuring that a 'just' punishment was achieved, and the courts were portrayed as fulfilling this moral 'duty'. This knowledge reflects how

judicial sentencing remarks privilege certain social groups over others and reinforce the use of prison as a mechanism for State violence and control in the courtroom.

6 The Criminal 'Other'

In this chapter, analysis of sentencing remarks will reveal that in accordance with Coyle (2016), the criminal justice system is seen to be preoccupied with certain offences, specifically those committed by the marginalised. More specifically, sentencing remarks will be examined to illustrate the ways in which imprisonment was legitimised as the deserved sentence to punish and discipline the insubordinate, immoral and dangerous offender who posed a threat not only to community safety but to the moral fabric of society. CDA of the remarks will indicate that these social constructions of the criminal 'Other' were used to responsibilise offenders for the crime 'problem' and deflect attention away from the State for the failures of the prison system. Similar to Chapter Five, this analysis will demonstrate that unequal power relations between the community and offender were exercised through the judicial sentencing remarks via discourses of 'justice' and 'morality'.

6.1 The 'Insubordinate'

Analysis of judicial sentencing remarks revealed that imprisonment was legitimised as an important punishment tool for 'insubordinate' offenders who had disrespect for the law. This view was explicitly voiced by one judge that sentenced an offender to six years' imprisonment for offences of break, enter and steal and breach of bonds: 'He [the offender] has regularly been sentenced to imprisonment for such offences and has displayed clearly a continuing attitude of disobedience to the law' (*R v Marks [2017] NSWDC 23*, para. 7). A similar comment was made by a judge in a case of supply of prohibited drugs and firearms, as well as possession of prohibited firearms: 'At least at the time he [the offender] committed these offences he was demonstrating a continuing attitude of disobedience to the law' (*R v*

Baxter [2017] NSWDC 320, para. 11). While these statements clearly position offending as a transgression of the law, what is less explicit is the view that crime is a rebellion to authority. This attitude of disrespect reinforces a narrow view of offending that constructs crime as the product of dishonest intentions rather than as a social problem, which was discussed in Chapter One (Section 1.4). Thus, in accordance with penal abolitionists Scott (2018, p. 68) and Coyle (2016, p. 16), such statements can be seen to reinforce the criminalisation of marginalised people and reveal that the criminal justice system is preoccupied with the management of such groups often described as having a 'low respectability'.

In addition to showing an attitude of disrespect to authority, offenders were also constructed as having disrespect for the *community*, which aided their status as deserving of punishment via imprisonment. For example, when sentencing an offender to five years' imprisonment for assault and armed robbery, one judge claimed that:

> His [the offender's] criminal history and the periods in custody do lead to the conclusion… that he has demonstrated, both as a juvenile and as an adult, a contumelious disregard for the law, for the property and person of others (*R v Tompkins [2017] NSWDC 398*, para. 8).

In this excerpt, the offender is constructed as an 'Other' and juxtaposed against the 'law-abiding' that are characterised by respect for the law and community. This lack of respect can be seen to reinforce the view that offenders are morally deficient and need to be disciplined through imprisonment (see Foucault 1995; Scott 2018). This discourse of insubordination has been similarly found among judges in the UK towards reoffenders that were viewed to have rejected previous opportunities given by the courts to stop offending (Tombs & Jagger 2006; Millie, Tombs & Hough 2007). Several judges in the present study similarly indicated that

offenders had taken advantage of the leniency previously shown to them, as evident in the following excerpt regarding an offender charged with multiple property offences:

> The offender's record displays numerous failures to grasp various non-custodial options afforded to him over the years and it is overall of a type that gives me little confidence as to his prospects of rehabilitation (*R v Everingham [2017] NSWDC 200*, para. 1).

Similar to Tombs and Hough (2006) and Millie, Tombs & Hough (2007), it is clear in this statement that the offender has *chosen* to continually disobey the law and abuse the court's leniency. This further portrays criminality within a narrow framework and additionally deflects attention away from the processes of disadvantage in the prison system perpetrated by the current State penal apparatus. Relations of power and ideologies within the courtroom can therefore be seen to be exercised and legitimised through judicial sentencing remarks that serve to shape dominant discourses of 'crime' and 'justice' beyond the courtroom.

6.2 The 'Immoral'

The discourse of the criminal 'Other' was found to be heavily grounded in the belief that some offenders lacked morals and sympathy for others. Such notions of 'immorality' were constantly voiced by judges towards drug users, with comments such as: 'Drug addicts often become, for the time that they are addicted at least, terrible people' (*R v Laratta [2017] NSWDC 227,* para. 1) and people that are seen 'in our Courts all the time, damaged and damaging others' (*R v Michael [2017] NSWDC 381,* para. 13). This strong moral language produces an image of these offenders as sub-human and inferior to 'normal' people that abide by socially shared moral codes. Through this discursive process of 'Othering', imprisonment is represented as the deserved punishment for the 'terrible' and the 'damaging'; the morally deficient who should be treated with an equal lack of sympathy.

The view of prison as a deserved punishment was overwhelmingly evident in child sexual assault cases – crimes perceived to be particularly 'immoral'. For example, child sex offenders were described as 'evil people that abuse children' (*R v Tham [2017] NSWDC 40*, para. 12) and their behaviour as 'predatory' (*R v. DS [2017] NSWDC 229*, para. 18), 'reprehensible' (*R v JOW [2017] NSWDC 201*, para. 2) and 'abhorrent' (*R v Rayfield [2017] NSWDC 174*, para. 2). Such strong moral terms can be seen to construct these offenders as inherently wicked and thus deserving of severe punishment via imprisonment. In so doing, these excerpts can be seen to reinforce the prevailing norms of society in privileging the best interests of the community over those of the offenders.

As discussed in Chapter Three (Section 3.5.1), previous studies have shown that males are constructed by the courts as more blameworthy and morally corrupt than females, especially in child sexual assault cases. While there were no cases involving female child sex offenders in the present study, analysis found that males were constructed as the usual perpetrator of such crimes. This was evident in the following comment:

> One of the puzzling features that offences involving child pornography present is this: how can a person gain sexual gratification whilst… he or she is watching a child be harmed? Yet, as is distressingly commonly the case that is precisely what many people, usually men, in the community experience as they see children engaged in sexual activity, even sexual activity involving bestiality and sadism (*R v Tham [2017] NSWDC 40*, para. 1).

It is clear in this excerpt that there is a rhetorical tone to the judge's comment when discussing the offender's intentions, which can be seen to represent these 'types' of offenders as 'deviant'. This sexual deviancy was thought to warrant a harsh prison sentence, with one judge claiming that: 'A clear message must be sent by the court to like-minded people in the community that sexual offending against children…will be severely punished by the courts'

(*R v AJB [2017] NSWDC 81*, para. 2). Such statements may reflect the belief found in previous research that child sex offenders are unlikely to be rehabilitated and therefore need to be incapacitated (Deering & Mellor 2014). Indeed, this view was exemplified when judges in almost every case of child sexual assault neglected the sentencing purpose of specific deterrence, whose focus is to deter individual offenders from committing similar crimes (Bagaric, Edney & Alexander 2018). It can therefore be suggested that imprisonment was constructed as the only possible 'solution' for dealing with such 'immoral' offenders.

In addition, analysis of the judicial sentencing remarks revealed that while males were also constructed as the usual perpetrators of domestic violence related offences, evident in the comment: 'People, and it is usually women, need to be protected from actions of the kind I have demonstrated' (*R v Mabb [2017] NSWDC 225*, para. 2), female perpetrators were constructed as more blameworthy. This was expressed by one judge who described a female offender convicted of assault and deprivation of children as an 'unfit' parent deserving of 'condign' punishment:

> For the victims to be treated in such a way by their mother is abhorrent and is deserving of significant punishment… Both victims were deprived of the love and support that they were entitled to expect from a parent. Children expect that they will grow up protected and nurtured by their parents. It is the fundamental right of every child to feel safe and secure in their home. The Courts must send a clear message to the community that such conduct will not be tolerated and will be met with condign punishment (*R v Steller [2017] NSWDC 274*, para. 1, 3).

As found in previous studies (Deering & Mellor 2009; Jeffries & Bond 2010; Mann, Menih & Smith 2014; Rodriguez, Curry & Lee 2006; Wiest & Duffy 2013), this statement clearly constructs the offender as violating her key role as a parent, as a mother, and as a woman, in having committed such an immoral and 'masculine' crime. Such statements portray an image of non-normative characters that violate social expectations around gender-roles, reinforcing

hegemonic moral norms of 'right' and 'wrong' behaviour and thus perpetuating the construction of criminals as 'deviant'. In this way, the severity of a prison sentence is seen as a 'right' response to deviant behaviour, supporting Coyle's (2016, p. 16) argument that 'the penal system is… preoccupied with the management of only certain transgression'.

6.3 The 'Dangerous'

In Chapter Three (Section 3.1), it was discussed that Australian sentencing has become focused on risk minimisation and managing 'dangerous' groups. In accordance with this literature, analysis of judicial sentencing remarks revealed that several judges constructed imprisonment as an effective tool for protecting the community from the 'dangerous Other'. This view of imprisonment and the 'risk' posed by offenders was explicitly voiced by one judge sentencing a property offender to six years' imprisonment:

> And sometimes, and this case is a good example, society simply needs a rest from regular offending. The mere fact of incarcerating someone means that they cannot commit offences of break, enter and steal (*R v Marks [2017] NSWDC 23*, para. 3).

While this statement implies that imprisonment is a temporary rather than permanent solution to offending, it nevertheless necessitates its use to manage the risk (i.e. further offences of break, enter and steal) posed by the offender. Previous studies in Australia have similarly found that judges rely on predictions of risk when sentencing offenders to prison (Mackenzie 2005; Warner, Davis & Cockburn 2017). These findings draw attention to the problems inherent in reaching a 'proportionate' sentence discussed in Chapter Two (Section 2.2.1), and in judges holding a high level of discretion to determine sentencing outcomes, as discussed in Chapter Three (Section 3.3). This emphasis on measuring and managing 'risk' can therefore be seen to further privilege the needs of the community over the offender, as found in

Chapter Five (Section 5.2). This is problematic, as the failures of the prison to reform offenders can be seen to create more danger and 'risk' of offending rather than reduce it. In accordance with penal abolitionism, this analysis therefore highlights the need to question the current State penal apparatus and advocate for solutions that seek to benefit all people, including those categorised as 'dangerous'.

Drug users were also constructed as a 'dangerous Other', claimed to be the largest contributors to the 'crime' problem. This was explicit in the claims: 'The connection between drug use and criminal offending is well known' (*R v Laratta [2017] NSWDC 227*, para. 19) and that 'The gaols would almost be empty if in some way the problems of offending by drug addicts in an effort to obtain money to obtain drugs could be solved' (*R v Pintley [2017] NSWDC 224*, para. 1). Although such statements imply that drug use is a widespread issue, drug users were nevertheless constructed as the root cause and solution to the problem, as evident in one case regarding a recidivist offender with a drug addiction:

> Should Mr Marks find on his release from custody that he is offered drugs again, I trust that the length of the sentence that I am about to impose will give him pause - will cause him to think about what he is doing because if he uses drugs it is almost certain that he will commit offences and if he does there can be only one outcome, even longer periods of imprisonment being imposed (*R v Marks [2017] NSWDC 23*, para. 28).

By asking the offender to 'pause' and 'think' about his actions, this statement clearly positions offending as a rational choice, in which one can overcome if they *choose* to do so. This emphasis on autonomy can be seen to be reinforce the narrow conception of offending found in Section 6.1 that minimises the role of social and economic disadvantage in offending and drug use (see Chapter One, Section 1.4). Thus, such statements can be seen to deflect attention away from the failures of the prison and amongst other systems such as the

health system, which legitimises the use of State violence and control to protect the community from those deemed ‘dangerous’ and ‘at risk’.

6.4 Conclusion

This study was designed to investigate the discursive legitimation of imprisonment as an important crime control tool in the NSW District Courts in 2017. With respect to this aim, this chapter revealed that imprisonment was constructed as a mechanism for safeguarding the moral codes of society by reinforcing the social construction of the criminal ‘Other’. Overwhelmingly, judges held narrow conceptions of crime that constructed offenders as insubordinate, immoral and dangerous. This further aided in legitimising imprisonment as a ‘punishment’ tool for the culpable rather than as a means to assist offender’s reintegration as law-abiding citizens. These findings exemplified that sentencing in the NSW District Court is preoccupied with offences committed by the marginalised and indicated that judicial sentencing remarks play an important role in shaping discourses of ‘morality’ and responses to ‘crime’ within and beyond the courtroom.

7 The Paradox of Sentencing Offenders to Prison

In the previous chapter it was demonstrated that the sentencing practice of imprisonment was justified through social constructions of criminals as an 'Other' and prison as a means of ensuring such criminal 'Others' were duly punished for their crimes. In this chapter, it will be discussed that judges also justified sentencing offenders to prison through techniques of denial/distancing and responsibilisation. Through a penal abolitionist lens, it will be shown that while judges acknowledged the criminogenic and harmful nature of prison, these pains were legitimised through blame-allocation of offenders and the need for punishment via imprisonment. This served to deflect attention away from the courts to deliver just outcomes for offenders and from the responsibility of the prison system to reform them.

7.1 Denial of Responsibility and Distancing of the Offender

Empirical evidence suggests that imprisonment is likely to increase an offender's likelihood of reoffending rather than reduce it (Nagin, Cullen & Jonson 2009; BOCSAR 2019c; Halsey 2007). CDA of judicial sentencing remarks revealed that several judges were well aware of this criminogenic effect of prison when sentencing offenders to imprisonment. One judge viewed prison as a 'terrible place' that 'produced' crime:

> Courts do not ignore the lived experience of gaol. Gaols are terrible places. It appears that harsher prison conditions do not necessarily discourage future offending and that, paradoxically, the experience of imprisonment may exert a criminogenic effect – in other words, a crime-producing effect (*R v Fisher [2017] NSWDC 56*, para. 1).

In addition, several judges voiced that a sentence of imprisonment was counterproductive to rehabilitation, in the sense that it could 'decrease' (*R v Austen [2017] NSWDC 425*, para. 10),

'reverse' (*R v Hall [2017] NSWDC 240*, para. 73), or 'render entirely futile' (*R v Ali [2017] NSWDC 46*, para. 15) an offender's prospects of resuming a normal, law-abiding life. This view was further reinforced by the belief that constant contact with prison was thought to exert an institutionalising effect, causing offenders to become 'virtually incapable of maintaining a law-abiding existence in the community' (*R v Sullivan [2017] NSWDC 219*, para. 21). These findings contrast with those found in Chapter Five and Six, where imprisonment was discursively represented as a means for community protection and aiding offender's rehabilitation. Why these judges sentenced offenders to prison despite knowing its inefficacy to achieve these aims suggests that imprisonment may serve a different purpose. Indeed, one judge who sentenced an offender to prison for three years and three months for two property offences and indecent assault voiced that the criminal justice system as a whole constituted an *inappropriate* response for dealing with crime:

> What his [the offender's] experience reveals, like that of so many others in a similar position, is the utter inadequacy of the legal system to deal with what effectively are problems of social welfare which should attract a far more appropriate response than repeated intersection with the criminal justice system (*R v Sullivan [2017] NSWDC 219*, para. 22).

Dissimilar to the construction found in Chapter Six of the criminal 'Other', this statement suggests that crime is a problem of 'social welfare' and therefore cannot be managed through 'punishment'. However, as found in Chapter Five (Section 5.1), judges justified a sentence of imprisonment by claiming that it was the only appropriate sanction for ensuring that the offender was adequately punished. This seemingly paradoxical view of prison provides further evidence of judges in the NSW District Court prioritising the visibility of (retributive) justice over the needs of offenders when sentencing them to imprisonment.

While several judges acknowledged that a sentence of imprisonment would fail to rehabilitate offenders, some explained that this was due to the criminal influence in custody rather than in being in prison. This view was voiced by one judge sentencing an offender to three years and eight months imprisonment:

> Pro-social contacts in the community are very important. Long gaol sentences can break down such support and encourage associations with those met in custody who do not have such attitudes (*R v Mead [2017] NSWDC 1*, para. 5).

Analysis of this statement found that while the offender would be separated from the positive influence of the community in prison, it was ultimately the 'association' with other criminals that was thought to encourage further offending. Previous studies such as Nagin, Cullen and Jonson (2009) and Vieraitis, Kovandzic and Marvell (2007) do lend some support to this view, however, they point out that this is but one factor of many that leads to the commission of further crime. This narrow view of the factors affecting further criminalisation provides more evidence of the deflecting technique found in Chapter Six that constructed prison as irreproachable and the criminal 'Other' as inherently deviant. Such statements can therefore be seen to legitimise the use of imprisonment as a 'punishment' tool.

Studies in the UK have found similar tendencies among judges to sentence people to prison despite knowing the realities of imprisonment. Millie, Tombs and Hough (2007) and Tombs and Jagger (2006) found that judges managed the daily practice of sending people to prison by claiming that they had no other sentencing option and that offenders needed to be punished. This could suggest that in accordance with the UK literature, judges in the NSW District Courts may be employing 'techniques of neutralization' (Skye & Matza, cited in Tombs & Hough 2006) that separate themselves from the realities of prison in order to get on with their daily 'job' of sentencing.

7.2 Responsibilisation of the Offender

In addition to justifying a sentence of imprisonment by separating themselves from the realities of prison, judges also justified a sentence of imprisonment by responsibilising offenders for their rehabilitation. This responsibilisation was explicitly expressed by one judge in regard to an offender with substance abuse issues:

> His prospects of rehabilitation are reasonable but will improve if he is given access to treatment programs whilst he remains in custody and ultimately when he is returned to the community, wherever that might be, on parole. His prospects of rehabilitation, however, are entirely dependent on his remaining free of drugs, and also on receiving treatment for post-traumatic stress disorder which, as I have said, has a close connection to his drug taking behaviour (*R v Estevez [2017] NSWDC 433*, para. 33).

Similarly, in a case involving offences of break, enter and steal, armed robbery and assault, for which the offender received seven years' imprisonment, another judge stated that:

> Ultimately, it is only this offender… who can get out of the revolving door. Corrective Services can provide as much assistance as they can, but if Mr Shelly wants to begin to enjoy life as a free man he has to make some difficult decisions, the most important of which is that he will actually make efforts to avoid committing offences in the future (*R v Shelley [2017] NSWDC 376*, para. 2).

In accordance with Hall (2016), such statements can be seen to responsibilise offenders for their rehabilitation and deflect attention away from the failures of prison and amongst other systems, such as the health and welfare system. As found in Chapter Six (Section 6.3), offenders are constructed as having a *choice*, not only to control their criminal trajectories but also their rehabilitation outcomes. Not only does this view overlook external factors such as the troubles facing people after release to resume law-abiding lives in the community (as discussed in Chapter One, Section 1.4), but it reinforces the 'penal utopia' discourse (Scott 2018, p. 23) where prisons can become places of safety and reform. Such statements can thus be seen as reinforcing a utilitarian view of punishment that views offenders as morally

deficient and in need of 'cure' via rehabilitation through punishment generally and imprisonment specifically (Scott 2018). However, as discussed in Chapter Two (Section 2.2.2), this belief is problematic, given that the goal of rehabilitation can serve to further marginalise offenders and lead to reoffending (Scott 2018).

7.3 Pain-Infliction as Necessary

Scott (2018) describes prisons as established on 'the constant and systematic deprivation of human need' and therefore deliberately designed to inflict pain and suffering on the individual (p. 22). The analysis of the judicial sentencing remarks indicates that judges frequently made references to these various 'pains' and 'sufferings' of imprisonment, noting the psychological and physical distress experienced by prisoners. First-time prisoners were thought to have it the worst, with one judge voicing that 'One's first time in custody is a frightening, upsetting and dangerous experience' (*R v Mella [2017] NSWDC 193*, para. 1). Another judge similarly commented that:

> The offender has found his time in custody difficult. I am not at all surprised to hear that, prisons are terrible places, even for those mentally well. This is the offender's first time in custody and I am sure it came as very much a shock to him (*R v Mabb [2017] NSWDC 225*, para. 10).

Judges in Queensland have similarly perceived prison to be a 'dangerous' and 'terrible' place that 'won't do much for the person or society' (Mackenzie 2005, p. 66). Such views suggest that judges do not see the prison as a place of moral reform but as pain-inflicting. Nevertheless, such pain can be seen as necessary to ensure that offenders are receiving their due 'punishment'.

One of the key types of pain experienced by offenders was the pain that comes from being isolated from the community. For example, when sentencing an offender to ten years' imprisonment for cultivation of illicit drugs, one judge expressed that: 'I can accept that anybody incarcerated in Goulbourn gaol would suffer with depression. Being in custody is extremely boring and that itself causes depression' (*R v Kbayli [2017] NSWDC 197*, para. 5). While depression in this statement is viewed to be a by-product of imprisonment, this clearly did not alter the decision to imprison the offender. Another judge acknowledged the adverse effect of prison on mental health yet, paradoxically, expressed that the solution could be treated with the problem: 'I have no doubt that Corrective Services are fully capable of dealing with the common sequelae of criminal offending and imprisonment, that is, depression and anxiety' (*R v Tran [2017] NSWDC 397*, para. 2). Such statements further exemplify that judges are acting contrary to their knowledge of the harsh realities of prison due to its perceived necessity as a mechanism of punishment.

Judges also recognised that some prisoners, by way of their age, health, circumstances or ethnicity, will inevitably experience harsher prison conditions and more suffering than others. This is evident in statements such as: 'Prisons are certainly not comfortable places for 58 year olds with back pain' (*R v Oygur [2017] NSWDC 278*, para. 26) and 'His [the offender's] time in custody will not only be harder because of his mental illness but also because he is separated from his family who live in a foreign country' (*R v Vardhanabhuti [2017] NSWDC 344*, para. 16). This awareness was similarly made regarding a male Indigenous offender, whose repeated intersection with the criminal justice system 'has had the tragic consequence of disconnecting him from his own community and culture and all the support and protection that comes with that kind of connection' (*R v Sullivan [2017] NSWDC 219*, para. 21). As these statements suggest, judges are aware that not all prisoners are receiving a proportionate

or ‘just’ sentence when sentencing them to prison. Prisoners in the UK have similarly reported that they experience the same punishments differently (Schinkel 2014; van Ginneken & Hayes 2016). The findings of the present study not only highlight the problem of retributive justice in achieving a truly proportionate sentence (Hudson 2003; Scott 2018) but also reveal that judges continue to sentence people to imprisonment in the name of ‘proportionality’ while knowing it will ultimately be experienced by people differently.

In addition to the pains experienced by offenders, judges voiced that the incarceration of offenders would also cause pain to their families. As evident in the following excerpts, two judges recognised that a term of imprisonment would cause relational strain:

> He [the offender] has a son aged twelve who is no doubt somewhat bewildered at the absence of his father…I accept that his absence from his son is a matter of distress for the prisoner and no doubt distress for the young boy (*R v Sikos [2017] NSWDC 242*, para. 59).

> There will be consequences too if the offender is imprisoned. The offender’s mother suffers from a condition where she cannot drive lengthy distances. As I mentioned, the offender’s sister lives in country New South Wales so the offender’s mother will suffer should the offender go to gaol. The offender’s daughter will suffer as well (*R v Read (No 2) [2017] NSWDC 323*, para. 4).

The acknowledgement of these ‘sufferings’ on offender’s families did not have an effect on the decision to imprison but served to further distance and responsibilise the offender for the consequences of their imprisonment. Such techniques must therefore be necessary if judges are to overlook the harsh realities of prison in sentencing and reinforce pain-infliction as necessary for ‘justice’.

This neutralisation technique was explicitly expressed by one judge who sentenced a female offender to prison for two years for driving offences: ‘I am sure she blames herself for the

consequences that must necessarily flow through her being sent to gaol' (*R v MacPherson [2017] NSWDC 170*, para. 16). This blame-allocation was similarly voiced by another judge regarding three male offenders convicted of illicit drug importation:

> It is apparent that each offender has a family which will suffer through his incarceration but that is, of course, common place when family men commit offences and are discovered… the fact is that each of the offenders knew that their families would suffer if they committed this offence, and were detected doing it, yet they went ahead anyway. It is a bit late now to rely on the circumstance that their families will suffer if they go to gaol. It was their decision to do what they did which has caused that suffering (*R v Aristizabal [2017] NSWDC 354*, para. 18).

In accordance with a penal abolitionist lens, CDA of these remarks suggests that through constructing prison as a 'necessary' and inevitable response to offending, judges are relying on the discourse of criminal blame. Such statements can be seen to construct offenders as having calculated the costs of their offending and thus deserving of the pains of imprisonment. Indeed, this supports Hulsman's (cited in Ruggiero 2011, p. 101) argument that '[c]riminal justice is perpetrator-oriented, based on blame-allocation and on a last judgement view on the world'. This view of offenders can therefore be seen to reinforce the necessity of State violence and control and to legitimise the judge's role in sentencing and as a 'moral entrepreneur' (Coyle 2013, p. 59) that shapes dominant discourses of 'justice' and 'morality' beyond the courtroom.

When considering judges' awareness of the harsh realities of prison in the present study, the emphasis on retributive justice provides evidence of the growing punitiveness in Australian criminal justice and the pressure for courts to show that 'justice' is being done (Freiberg 2016; Hall 2016; Tubex et al. 2015). Indeed, judges frequently voiced the importance of community expectations in sentencing, claiming, for example, that the community has an 'entitlement to exact retribution' (*R v BJ [2017] NSWDC 234*, para. 10) and that for serious

offences such as child sexual assault, 'the community expects, and is entitled to expect that stern sentences will be imposed' (*R v Rolfe [2017] NSWDC 186*, para. 2). Such statements not only reinforce dominant notions of 'justice' that privilege the community over the offender but also legitimise the State violence and control of offenders via imprisonment as a means for 'punishment'.

7.4 Conclusion

This chapter has highlighted that despite acknowledging the harsh realities of imprisonment, judges in the NSW District Court continue to sentence offenders to prison. Judges were found to manage conflicting views of imprisonment by distancing themselves from offenders, deflecting blame and prioritising the need for community retribution. A sentence of imprisonment was legitimised through constructing offenders as responsible for their rehabilitation and for the inevitable consequences resulting from their incarceration. Overall, this chapter sheds light on the techniques employed by judges to justify the harm-inflicting practice of imprisonment on the basis of 'punishment'.

8 Conclusion

Given the growth in the NSW prisoner population and subsequent increases in prison expenditure, the intention of this project was to investigate why imprisonment continues to be used as an important form of crime control despite failing to achieve its aims. The broad aim of this study was to utilise the methodological framework of CDA to examine how imprisonment is being discursively constructed in the NSW District Court. By focusing on judicial constructions of imprisonment and the way in which judges justified a sentence of imprisonment, socially constructed 'crime' and 'criminals and drew upon dominant understanding of 'justice' and 'morality, the research aims and objectives were achieved. In this concluding chapter, the key findings of the project are discussed, and an outline is provided for how this project contributes to the existing literature, as well as recommendations for future research.

8.1 Key Research Findings

This study has identified that judges sentencing offenders to prison in the NSW District Court during 2017 discursively constructed imprisonment as an important 'punishment' tool to assure the public that 'justice' was being achieved. Judge's views of 'justice' and 'morality' were found to be heavily grounded in retributive ideas of punishment that reinforced a privileged view of the community over the offender and led to the prioritisation of some sentencing purposes over others. These purposes included adequate punishment, community protection through deterrence and rehabilitation, and the public 'right' to denunciation. Overall, the analysis found the focus on 'punishment' reinforced the use of prison as a mechanism for State violence and control.

This study has also revealed that judges held narrow conceptions of crime that socially constructed the marginalised as an 'Other' and deflected attention away from the failures of prison and the processes of disadvantage perpetrated by the State. Imprisonment was legitimised as the 'right' sentence to punish and discipline those deemed insubordinate, immoral and dangerous, and to protect society against the moral corruption of such 'Others'. The analysis revealed how dominant notions of 'crime' informed the judicial decision to imprison offenders, supporting Coyle's (2016) claim that the criminal justice system is preoccupied with certain offences, specifically those committed by the marginalised.

Another key research finding is that judges justified a sentence of imprisonment through techniques of neutralisation. While judges acknowledged the criminogenic and harmful nature of imprisonment, analysis found that judges managed conflicting views by distancing themselves from offenders, allocating blame and responsibility on offenders and prioritising the need for community retribution. Imprisonment was again represented as a 'punishment', and the pains of prison were viewed to be necessary to achieving this aim.

Overall, this project has demonstrated how prevailing ideologies of 'crime', 'justice' and 'morality' are exercised and legitimised through judicial sentencing remarks. Judges were revealed to be 'moral entrepreneurs' shaping dominant discourses of crime and punishment within and beyond the courtroom. The prominence given to retributive ideas of punishment and the needs of the community over the offender reveal that judges in the NSW District Courts are legitimising the State violence and control over the most marginalised via the pain-inflicting practice of imprisonment. Ultimately, this legitimation of pain was found to be primarily rooted in the construction of imprisonment as a 'punishment' tool.

8.2 Research Contributions

In the broadest sense, this project has contributed to the existing criminological body of literature regarding the sentencing practice of imprisonment by bringing to the fore the largely unexplored discourses of imprisonment among the NSW judiciary. While existing works such as Mackenzie (2005), Warner, Cockburn and Davis (2017) and Warner et al. (2017) looked at judicial perceptions and preferences for sentencing purposes, these were conducted in other Australian criminal jurisdictions and did not investigate the discursive practices of the judiciary. The uniqueness of the research reported in this thesis is grounded in the explicit focus on the wider assumptions and discourses of imprisonment perpetuated by judges in the NSW District Court, within a context where the prisoner population and prison expenditure are the highest in Australia (ABS 2019a; BOCSAR 2019a).

This project has generated insights supporting the penal abolitionist argument that the State violence and control of marginalised persons can be seen as exercised and legitimised through the pain-inflicting practice of imprisonment, as found among judges in the NSW District Court. In accordance with the work of Coyle (2016, p. 59), the findings show that imprisonment and ideas of 'crime', 'justice' and 'morality' are socially constructed through the language of 'moral entrepreneurs' and 'public discourse leaders' such as judges. Discourses such as judicial sentencing remarks are therefore shown to have significant implications regarding who is criminalised in society and what is seen to be the 'right' response to offending.

This project has exposed imprisonment as a system that is designed to harm offenders rather than to promote the flourishing of all people, including those criminalised and imprisoned. Despite its harsh realities and its failures to meet its purported goals of community protection

and reducing reoffending, this study has shown that imprisonment continues to be used as an important form of crime control in the NSW District Court. In so doing, these findings call for a shift in dominant discourses of imprisonment perpetrated in the *Act* and by NSW District Court judges to assist in addressing the high prisoner population by creating more equitable outcomes for offenders. A rethinking of such discourses in this context can aid the NSW Government in providing 'safe, just, inclusive and resilient communities' (DCJ 2019a, para. 1). Such awareness of the discursive practices of the judiciary can help decision makers to be more intentional with their language choices and to consider alternatives to imprisonment that seek to address crime as a social rather than criminal issue.

In addition, this thesis has contributed to the CDA literature and provided insights into the discursively rich nature of judicial sentencing remarks. While previous studies have tended to focus on the discursive constructions of particular offending groups within the Lower and Supreme Courts (see for example, Jeffries & Bond 2010; Peters 2002; Sullivan 2017; REF), this project contributed to an understanding of these issues within the specific context of a sentence of imprisonment.

It is recognised that this study had several limitations. First, the use of judicial sentencing remarks as a data source provided limited information regarding judges' individual perceptions of imprisonment. This meant that while views could be ascertained from the remarks, much valuable information regarding the nuances of judge's views may have been missed. In addition, as mentioned in Chapter Four (Section 4.5.1), qualitative analyses such as in the present project are liable to the researcher's subjectivities and biases and motivations that may have guided the data collection, coding and analysis of this project. Lastly, while demographic information of offenders was coded during the coding procedure,

it is recognised that this was largely overlooked in the analysis of this study, indicating that much important information could have been missed.

Despite these limitations, this study provides a number of insights for further research. Further work needs to be done to establish how imprisonment is discursively constructed in other court levels of NSW and in other Australian criminal jurisdictions that have different prisoner populations and offender demographics. Moreover, future research should examine whether similar discourses of imprisonment as identified in the present study are evident in other justice discourses, including government reports, websites and in the criminological literature. As such, further research will contribute to a more nuanced understanding of imprisonment as an important crime control tool in Australia, challenge dominant discourses perpetuated by the current State penal apparatus regarding imprisonment, and contribute to a new discourse facilitating 'the realization of social rather than criminal justice' (Baldry, Carlton & Cuneen 2015, p. 171).

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Appendices

Table 1. Framework for coding constructions of imprisonment

Construction	Coding Criteria	Example
Mostly Negative	• Imprisonment portrayed as criminogenic for offenders	'Gaols are terrible places. It appears that harsher prison conditions do not necessarily discourage future offending and that, paradoxically, the experience of imprisonment may exert a criminogenic effect – in other words, a crime-producing effect' (*R v Fisher [2017] NSWDC 56*, para. 1).
	• Imprisonment portrayed as counterproductive to offender's rehabilitation	'...retributive punishment can seriously impede rehabilitation and an offender's capacity to resume normal community life' (*R v Miles [2017] NSWDC 411*, para. 22).
	• Imprisonment portrayed as institutionalising for offenders	'Mr Shelley is one of those offenders who, due to his repeated offending, has spent a great deal of his adult life in custody, so much so that when he is released from gaol he has difficulty living in the community, often leading to early reoffending and, returning to custody in a manner akin to a revolving door' (*R v Shelley [2017] NSWDC 376*, para. 1).
	• Imprisonment portrayed as harmful for offenders	'The offender has found his time in custody difficult. I am not at all surprised to hear that, prisons are terrible places, even for those mentally well' (*R v Mabb [2017] NSWDC 225*, para. 10).
	• Imprisonment portrayed as harmful for offender's families	'I accept that the incarceration of the offender would have an adverse effect on her [the offender's partner] and the children' (*R v Cao [2017] NSWDC 268*, para. 7).
	• Imprisonment portrayed as failing to address the root cause of offending	'What his [the offender's experience reveals, like that of so many others in a similar position, is the utter inadequacy of the legal system to deal with what effectively are problems of social welfare which should attract a far more appropriate response than repeated intersection with the criminal justice system' (*R v Sullivan [2017] NSWDC 219*, para. 22).
Mostly Positive	• Incarceration portrayed as helpful for offender's rehabilitation	'Here, there is no evidence that full time custody will have the effect of nullifying the offender's rehabilitation. Rather, he will have access to rehabilitation programs that will assist his return to the community' (*R v Lico [2017] NSWDC 133*, para. 1).
	• Incarceration portrayed as a 'just' sentence	'The Court must impose adequate punishment… The sentence must reflect both justice to the offender but also the community' (*R v Miles [2017] NSWDC 411*, para. 22).
	• Incarceration portrayed as an effective deterrent	'… he [the offender] must serve some sentence of imprisonment merely to enforce general deterrence as

		well as specific deterrence' (*R v Sfeir [2017] NSWDC 393*, para. 2).
	• Incarceration portrayed as an effective form of denunciation	'… it is the fact of imprisonment rather than the length of the sentence which will be of greatest significance to punish the offender and denounce the conduct' (*R v Na [2017] NSWDC 244*, para. 2).
	• Incarceration portrayed as necessary to protect the community from dangerous offenders	'The Court of Criminal Appeal has repeatedly emphasised that significant sentences are required in child sexual assault cases in order to protect vulnerable children from sexual exploitation' (*R v ME [2017] NSWDC 308*, para. 1).
Neutral	• Incarceration portrayed as a last resort	'Having considered all possible alternatives, I am satisfied that no penalty other than imprisonment is appropriate (*R v JOW [2017] NSWDC 201*, para. 2).
Mixed	-	-

Source: Latent coding guidelines for the CDA of judicial sentencing remarks from criminal cases in the NSW District Court that included a sentence of imprisonment in 2017.

Table 2. Framework for coding sentence justifications

Reason	Coding Criteria	Example
Accountability	Sentence of imprisonment described as holding offenders to account for their conduct	'… we see them [drug users] in our Courts all the time, damaged and damaging others. People such as this offender must take responsibility for this conduct' (*R v Leslie [2017] NSWDC 381*, para. 13).
Adequate Punishment	Sentence of imprisonment described as a 'just' and proportionate punishment	'Ultimately I have to impose a sentence on the offender which reflects the objective gravity of his conduct. In each case his criminality was significant… [so] he must spend a significant time in gaol' (*R v Kirk [2017] NSWDC 195*, para. 26-27).
Community Protection/ Incapacitation	Sentence of imprisonment described as protecting the community from the offender	'And sometimes, and this case is a good example, society simply needs a rest from regular offending. The mere fact of incarcerating someone means that they cannot commit offences of break, enter and steal' (*R v Marks [2017] NSWDC 23*, para. 3).
Denunciation	Sentence of imprisonment described as denouncing the offender's conduct	'The Court is also required to pass a sentence... to adequately express our society's disapproval of his conduct' (*R v Rustom [2017] NSWDC 245*, para. 9).
General Deterrence	Sentence of imprisonment described as deterring potential offenders from crime and protecting the community	'General deterrence is a fundamental consideration to a drug importation offence. The sentence must be of such severity to deter others from engaging in activities to smuggle prohibited goods into Australia' (*R v Villa [2017] NSWDC 121*, para. 1).
Recognition of Harm	Sentence of imprisonment described as a recognition of the harm caused by the offender's conduct	'One of the most important aspects of determining a sentence to impose upon an offender concerns the harm that that offence has caused' (*R v DS [2017] NSWDC 229*, para. 11).
Rehabilitation	Sentence of imprisonment described as promoting an offender's rehabilitation	'The sentence that I impose upon him will… be a significant impetus to the offender engaging in

		further rehabilitation' (*R v Laratta [2017] NSWDC 227*, para. 17).
Specific Deterrence	Sentence of imprisonment described as deterring offenders from future offending	'The sentence that I impose upon him will itself be a significant deterrent to him conducting himself in such a way in the future' (*R v Laratta [2017] NSWDC 227*, para. 17).

Source: Latent coding guidelines for the CDA of judicial sentencing remarks from criminal cases in the NSW District Court that included a sentence of imprisonment in 2017.

Table 3. Framework for coding constructions of 'crime'

Construction	Coding Criteria	Example
Harmful	Crime represented as an action directly harming the community	'In truth we are all harmed by drugs, drug use and thus drug supply' (*R v Farmer [2017] NSWDC 22*, para. 18).
Deviant	Crime represented as deviant/abnormal behaviour	'It is one of the fundamental aspects of sentencing that we impose sentence to protect the community and members of it, particularly vulnerable members of society such as children who are vulnerable to the predations of their teachers who seek inappropriate outlets for their sexual urges' (*R v King [2017] NSWDC 297*, para. 51).
Immoral	Crime represented as a transgression of the moral boundaries of society	'For the victims to be treated in such a way by their mother is abhorrent… The Courts must send a clear message to the community that such conduct will not be tolerated and will be met with condign punishment' (*R v Steller [2017] NSWDC 274*, para. 1, 3).
Social Problem	Crime represented as a problem of social welfare	'What his [the offender's] experience reveals, like that of so many others in a similar position, is the utter inadequacy of the legal system to deal with what effectively are problems of social welfare' (*R v Sullivan [2017] NSWDC 219*, para. 22).
Unlawful Conduct	Crime represented as a violation of the criminal law	'… [There] is no excuse for breaking the law, for committing crime' (*R v Foo [2017] NSWDC 395*, para. 3).

Source: Latent coding guidelines for the CDA of judicial sentencing remarks from criminal cases in the NSW District Court that included a sentence of imprisonment in 2017.

Table 4. Framework for coding constructions of 'criminals'

Construction	Coding Criteria	Example
Dangerous	Criminals represented as presenting a danger to the community	'Children are at risk of the predatory behaviour of adults as they seek to satisfy their sexual desires… Children need to be protected because, through naivety, they are not in a position to protect themselves' (*R v DS [2017] NSWDC 229*, para. 18).
Deserving	Criminals represented as deserving of punishment	'When an offender, even an 18 year old, conducts himself in a manner which involves serious conduct then lengthy sentences must necessarily result' (*R v Farmer [2017] NSWDC 22*, para. 25).

Disadvantaged and Prone to Offending	Criminals represented as disadvantaged due to poor social and economic circumstances, drug dependency, etc.	'I accept that on the material the offender suffered from an adverse childhood which was hardly likely to result in the offender becoming a law-abiding citizen' (*R v Buchanan [2017] NSWDC 408*, para. 8).
Immoral	Criminals represented as lacking morals and sympathy	'… for the reasons given the offender's conduct can only be described as a disgrace and an appalling breach of trust by a person in authority on vulnerable young people' (*R v Slattery [2017] NSWDC 373*, para. 12).
Insubordinate	Criminals represented as defiant of authority and lacking respect for the law and the rights of the community	'… the evidence [relating to the offender] discloses a degree of contempt for authority and a disregard for public safety and for compliance with laws and regulations' (*R v Ali [2017] NSWDC 46*, para. 19).
Morally Culpable	Criminals represented as autonomous/ responsible for their criminal conduct	'It is important that the offender, and in fact everyone in the community, understand that the only person responsible for his [the offender's] criminal behaviour is him, and him alone' (*R v Baradi [2017] NSWDC 175*, para. 1).

Source: Latent coding guidelines for the CDA of judicial sentencing remarks from criminal cases in the NSW District Court that included a sentence of imprisonment in 2017.

Table 5. Demographic information

Case No.	Head Sentence (imprisonment)	Offence	Gender	Age	Ethnicity/ Nationality
NSWDC 1	3 years 8 months	Manufacture, possess and supply prohibited drug, deal with property suspected proceeds of crime, make and possess equipment to make false document	Male	31	-
NSWDC 4	3 years	Five charges contravening a control order (offender accessed extremism propaganda relating to a terrorist organisation)	Male	22	Afghan
NSWDC 22	6 years	Attempted armed robbery in company, ongoing drug supply (meth)	Male	21	-
NSWDC 23	6 years	Break, enter and steal, breach of bonds	Male	42	-
NSWDC 36	9 years	Two charges of aggravated indecent assault	Male	33	Tanzanian
NSWDC 40	3 years	Using a carriage service to access child pornography, possessing child abuse material	Male	-	Malaysian
NSWDC 41	6 years	Aggravated break and enter, with intent to commit larceny whilst armed	Male	36	-

NSWDC 46	8 years	Eighteen charges relating to conspiracy to import and possess firearms, knowingly take part in the sale of a pistol, providing false information	Male	32	-
NSWDC 56	8 years 5 months	Assault, intent to intimidate, two counts sexual intercourse without consent, one including recklessly inflict actual bodily harm	Male	-	-
NSWDC 65	10 months	Dealing with money reasonably suspected of being proceeds of crime	Male	-	Lebanese
NSWDC 69	3 years 4 months	Supply of prohibited drug (cocaine)	Male	-	-
NSWDC 73	5 years	Six charges of supply firearm without license, two charges of supply of unregistered firearm, supply prohibited drug, dealing with the proceeds of crime	Male	-	-
NSWDC 75	2 years 3 months	Car-rebirthing	Male	20	Kiwi
NSWDC 76	2 years 3 months	Car-rebirthing	Male	20	-
NSWDC 81	4 years	Act of indecency to a person under the age of 16 years	Male	71	-
NSWDC 84	4 years	Indecent assault, sexual intercourse with a child between the ages of 10 and 14 years	Male	-	-
NSWDC 85	5 years	Supply heroin on an ongoing basis, supplying prohibited drug	Male	-	-
NSWDC 120	2 years 9 months	Two charges of take part in supply of an amount of a prohibited drug, supply prohibited drug	Male	-	Aboriginal
NSWDC 123	4 years 6 months	Possess prohibited drug, two charges of not keep prohibited firearm safely, three charges of not keep pistol firearm safely, possess ammunition without holding licence	Male	-	-
NSWDC 125	3 years	Two charges of supply prohibited drug	Male	-	-
NSWDC 126	8 years	Wounding with intent to murder	Female	45	Vietnamese
NSWDC 133	2 years 6 months	Three charges of supply prohibited drug	Male	22	-

NSWDC 138	6 years	Two charges of knowingly facilitate organise car-rebirthing activity, recklessly deal with the proceeds of crime	Male	-	-
NSWDC 145	5 years 6 months	Obtain financial advantage dishonestly, possess false document to obtain financial advantage, possessing identification information to commit an indictable offence	Male	39	-
NSWDC 153	10 years	Two charge of sexual intercourse without consent, three charges of act of indecency	Male	48	-
NSWDC 157	4 years 6 months	Four counts of aggravated break and enter and commit serious indictable offence (steal) in company, two counts of break and enter and commit serious indictable offence (steal), take and drive conveyance without consent of owner, police pursuit, resist and assault officer in execution of duty	Male	23	Indigenous
NSWDC 164	4 years	Robbery	Male	-	-
NSWDC 166	5 years	Attempted aggravated carjacking, wounding causing actual bodily harm, armed robbery, driving in a manner dangerous during a police pursuit	Male	23	-
NSWDC 170	2 years	Dangerous driving occasioning grievous bodily harm under the influence of drugs	Female	-	-
NSWDC 172	4 years	Cultivate large commercial quantity of prohibited plant	Male	-	-
NSWDC 174	2 years 7 months	Use of a carriage service to groom a person under 16 years of age for sexual activity	Male	60	-
NSWDC 175	4 years 6 months	Common assault following the breach of bond, assault, aggravated break, enter and detain for advantage	Male	-	-
NSWDC 176	5 years 6 months	Break, enter and steal, aggravated break, enter and steal	Male	42	-

NSWDC 186	5 years 3 months	Sexual intercourse with a child under the age of 14 years, sexual intercourse with a child with a child under 16 years	Male	29	-
NSWDC 187	12 years	Aid, abet, counsel or procure the commission of an offence by another person, namely the importation of a commercial quantity of drug	Male	-	Chinese
NSWDC 188	6 years 6 months	28 charges of break, enter and steal type offences	Male	41	-
NSWDC 193	6 years	Four charges of drug supply	Male	30	-
NSWDC 194	3 years	Robbery in company	Male	-	-
NSWDC 195	7 years 6 months	Ongoing supply of prohibited drug, firing a firearm in a manner likely to injure persons or property, using an unauthorised prohibited firearm, reckless wounding	Male	-	-
NSWDC 197	2 months 13 days	Two charges of affray, assault occasioning actual bodily harm committed whilst in company	Male	30	Syrian/Lebanese
NSWDC 200	3 years 2 months	Demanding property with menaces or by force with the intent to steal, aggravated take and detain without consent and with the intention of obtaining an advantage, dishonestly obtaining property by deception	Male	-	-
NSWDC 201	6 years	Rape	Male	66	-
NSWDC 211	7 years 6 months	Commercial quantity of prohibited drug	Male	23	Taiwanese
NSWDC 219	3 years 3 months	Aggravated enter dwelling with intent to commit a serious indictable offense (larceny), stealing property from a dwelling house, indecent assault	Male	38	Indigenous (Aboriginal)
NSWDC 224	2 years 6 months	Break, enter and steal	Male	-	
NSWDC 225	4 years	Aggravated break and enter, using a carriage service to menace	Male	-	-

NSWDC 227	5 years	Supply of commercial quantity of prohibited drugs	Male	-	-
NSWDC 228	4 years	Dishonestly obtaining a financial advantage	Female	-	-
	18 months	Recklessly dealing with the proceeds of crime	Male		
NSWDC 229	5 years	Homosexual intercourse with a child under the age of 10	Male	-	Maltese
NSWDC 234	6 years	Recklessly causing grievous bodily harm	Male	25	-
NSWDC 240	5 years	Two counts of threaten to inflict actual bodily harm by means of an offensive weapon with intent to have sexual intercourse, two counts of sexual intercourse without consent	Male	-	-
NSWDC 242	5 years 5 months,	Supply of substantial quantities of prohibited drugs	Male	54	-
NSWDC 244	1 year	Supply prohibited drug on an ongoing basis, knowingly dealing with the proceeds of crime	Male	25	South Korean
NSWDC 245	5 years 3 months	Supply prohibited drug in a commercial quantity	Male	42	-
	3 years 9 months	Supply prohibited drug in a commercial quantity	Male	42	British/Swiss
NSWDC 268	4 years 9 months	Supply prohibited drug on an ongoing basis, two charges of possess prohibited drug, deal with property suspected of being proceeds of crime	Male	-	-
NSWDC 272	9 years	Importing a commercial quantity of a border controlled drug	Male	30	-
NSWDC 274	3 years 4 months	Eight charges of assault occasioning actual bodily harm, two charges of assault, recklessly wound	Female	55	-
NSWDC 278	5 years	Assault with intent to rob whilst armed with an offensive weapon	Male	56	-
NSWDC 280	2 years 11 months	Conspiracy to commit offence, dispose of property known to have been stolen, car re-birthing, conspiracy to cheat or defraud	Male	58	-

NSWDC 281	8 years 2 months	Indecent assault, buggery	Male	-	-
NSWDC 282	7 years 4 months	Sexual intercourse without consent, occasion actual bodily harm, assault and occasion actual bodily harm	Male	-	Chinese
NSWDC 283	1 year 10 months	Possess unauthorised pistol, possessing ammunition for unauthorised firearm	Male	24	-
NSWDC 297	2 years 6 months	Two charges of indecent assault	Male	79	-
NSWDC 308	18 years	Inciting aggravated act of sexual intercourse with a person between the ages of 14 and 16 years, inciting aggravated act of indecency	Male	-	-
NSWDC 310	12 years	Three charges of sexual assault with a child under the age of 10	Male	68	-
NSWDC 314	6 years	Knowingly take part in an attempt to manufacture or produce a prohibited drug	Male	39	Chinese
NSWDC 315	3 years 3 months	Seven charges of dealing with property reasonable suspected of being the proceeds of crime	Male	-	Chinese
NSWDC 317	3 years 9 months	Two charges of breaking, entering and stealing property, resisting the police officer in the execution of duty	Male	28	-
NSWDC 320	9 years 6 months	Two charges of supply indictable quantity of prohibited drug, attempting to supply a prohibited firearm, possessing shortened 12-gauge shotgun	Male	-	-
NSWDC 321	3 years 6 months	Being armed with intent to commit assault, possessing means of disguising his face with intent to commit assault	Male	33	-
NSWDC 323	18 months	Dangerous driving occasioning grievous bodily harm	Male	41	-
NSWDC 328	8 years 6 months	Attempted robbery while armed with a dangerous weapon, knowingly rive or be carried in conveyance without consent of owner, robbery while armed with a dangerous weapon	Male	24	Fijian/ Aboriginal

NSWDC 339	3 years 8 months	Supply prohibited drug, possess unauthorised prohibited firearm, possessed unauthorised pistol	Male	-	-
NSWDC 341	2 years 7 months	Recklessly causing grievous bodily harm	Male	32	-
NSWDC 344	4 years,	Trafficking and importing a commercial quantity of a border controlled drug	Male	-	Thai
NSWDC 350	5 years 10 months	Supply prohibited drug, possess unregistered firearm, possess prohibited weapon, supply not less than the commercial quantity of a prohibited drug	Male	-	-
	7 years	Ongoing supply of prohibited drug	Male	-	Lebanese
	7 years 3 months	Ongoing supply of prohibited drug	Male	-	Lebanese
	7 years 6 months	Ongoing supply of prohibited drug	Male	-	Lebanese
NSWDC 354	5 years 6 months	Attempting to possess a marketable quantity of border controlled drug, importing a marketable quantity of cocaine, dealing with the proceeds of crime	Male	-	Colombian
	7 years 6 months	Importing marketable quantity of prohibited drug	Male	-	Colombian
	3 years 6 months	Attempting to possess a marketable quantity of border controlled drug	Male	-	Colombian/Argentinean
NSWDC 355	3 years 9 months	Importing a marketable quantity of border controlled drug	Male	41	Mexican
NSWDC 357	2 years 3 months	Cultivate prohibited plant, use of electricity without authority	Male	23	Vietnamese
NSWDC 358	15 years 4 months	21 counts of sexual intercourse without consent, attempted sexual intercourse without consent, recklessly causing grievous bodily harm	Male	-	-
NSWDC 362	8 years	Aggravated people smuggling	Male	28	-
NSWDC 373	3 years 10 months	Two counts of assault, two counts of act of indecency	Male	69	-

NSWDC 376	7 years	Break enter and steal, armed robbery, actual bodily harm	Male	-	-
NSWDC 379	3 years 10 months	Deal with the proceeds of crime	Male	39	-
NSWDC 381	1 year 6 months	Supply prohibited drug	Male	-	-
NSWDC 385	4 years	Three offences of possessing prohibited drugs, ongoing supply of prohibited drug, participating in a criminal group and contributing to criminal activity	Female	41	-
NSWDC 395	1 year 4 months	Aiding and abetting the commission of dealing with cash, dealing with money suspected to be the proceeds of crime	Male	46	Vietnamese
	1 year 6 months	Dealing with the proceeds of crime	Male	34	Malaysian
	1 year 9 months	Dealing with the proceeds of crime	Male	28	Malaysian
	1 year 17 days	Driving for those engaged in money laundering	Male	24	-
NSWDC 397	13 years 4 months	Five charges of knowingly take part in the cultivation of not less than a large commercial quantity of prohibited plants, take part in the cultivation of not less than a commercial quantity of prohibited plants	Male	37	-
NSWDC 398	5 years	Armed with an offensive weapon, attempt to take moto vehicle with assault while armed	Male	-	-
NSWDC 400	13 years 6 months	Importing and possessing the marketable quantity of any border controlled drug	Male	36	Nigerian
NSWDC 402	3 years 6 months	Inmate escape custody, assault officer in the execution of duty, knowingly be carried in a stolen conveyance	Male	32	Indigenous
	5 years	Inmate escape custody, assault officer in the execution of duty, break, enter and steal, police pursuit and driving dangerously	Male	31	Indigenous
NSWDC 403	8 years	Wounding with intent to cause grievous bodily harm	Male	41	-

NSWDC 405	2 years 6 months	Aggravated break and enter and commit serious indictable offence in company	Males	38	Indigenous
NSWDC 406	8 years	Two charges of robbery while armed with a dangerous weapon	Male	34	-
NSWDC 407	8 years	Incite sexual intercourse with a child under the age of 10 years, use child under 14 years to make child abuse material, four charges of use carriage service to transmit child pornography, use of carriage service to promote child pornography, possess child abuse material	Male	56	Kiwi
NSWDC 408	4 years	Armed robbery	Male	20	Indigenous
	4 years 6 months	Armed robbery, damage police camera	Male	-	-
NSWDC 409	3 years	Entering a dwelling house with intent to commit larceny	Male	21	-
NSWDC 410	2 years 6 months	Supply of prohibited drug	Male	32	-
NSWDC 411	4 years	Fraud	Male	-	-
NSWDC 421	8 years	Aggravated break, enter and steal, commit serous indictable offence (larceny)	Male	28	-
	10 years	Aggravated break, enter and steal, commit serous indictable offence (larceny)	Male	32	-
	7 years	Aggravated break, enter and steal, commit serous indictable offence (larceny)	Male	23	Russian
	8 years	Aggravated break, enter and steal, commit serous indictable offence (larceny)	Male	29	-
NSWDC 425	2 years 3 months	Supply prohibited drug	Male	39	-
NSWDC 428	3 years 9 months	Cultivate prohibited drug in a quantity not less than the large commercial quantity	Male	37	Vietnamese
NSWDC 429	5 years 6 months	Intention of dishonestly causing a loss to the Commonwealth	Male	45	Chinese

NSWDC 432	5 years 4 months	Sexual intercourse without consent, attempted sexual intercourse without consent, indecent assault	Male	-	-
NSWDC 433	9 years	Import a commercial quantity of border controlled drug	Male	-	-
NSWDC 434	5 years	Import a commercial quantity of border controlled drug	Male	-	Chinese
NSWDC 435	5 years	Causing grievous bodily harm, recklessly causing actual bodily harm, assault occasioning actual bodily harm	Male	25	Maori

Source: Manifest coding guidelines for the CDA of judicial sentencing remarks from criminal cases in the NSW District Court that included a sentence of imprisonment in 2017.