Inequities, Alternatives and Future Directions: Inside Perspectives of Indigenous Sentencing in Queensland

Christine Bond¹

Samantha Jeffries²

Heron Loban³

Address for Correspondence:
Dr Christine Bond
School of Justice
Queensland University of Technology
GPO Box 2434, Brisbane, QLD, 4001, Australia
Email: christine.bond@qut.edu.au

¹ School of Justice, Queensland University of Technology
² School of Justice, Queensland University of Technology
³ School of Law, James Cook University
Inequities, Alternatives and Future Directions: Inside Perspectives of Indigenous Sentencing in Queensland

Abstract

In Australia, sentencing researchers have generally focussed on whether there is statistical equality/inequality in outcomes by reference to Indigenous status. However, contextualising the sentencing process requires us to move away from a reliance on statistical analyses alone, as this approach cannot tell us whether sentencing is an equitable process for Indigenous people. Consultation with those working at the sentencing ‘coal face’ provides valuable insight into the nexus between Indigenous status and sentencing. This article reports the main themes from surveys of the judiciary and prosecutors, and focus groups of Community Justice Groups undertaken in Queensland. The aim is to understand better the sentencing process for Indigenous Queenslanders. Results suggest that while there have been some positive developments in sentencing (e.g. the Murri Court, Community Justice Groups) Indigenous offenders still face a number of inequities.

Key Words: Indigenous sentencing; Prosecutors; Community Justice Groups; Judiciary
Introduction: Prior Research on the Sentencing of Indigenous Offenders

In Australia, research on Indigenous status and sentencing has focussed overwhelmingly on statistical analyses (see Bond & Jeffries, 2011a; Bond & Jeffries, 2011b; Bond & Jeffries, 2011c; Bond, Jeffries & Weatherburn, 2011; Bond & Jeffries, 2010; Jeffries & Bond, 2009; Snowball & Weatherburn, 2006, 2007). The vast majority of this research examines whether there is equality in higher (i.e. District and Supreme) court sentencing decisions on imprisonment, after adjusting for other differences in social and offending histories of Indigenous and non-Indigenous offenders. These studies have found either statistical equality or leniency extended to Indigenous offenders when they appear before courts under statistically similar circumstances to those of non-Indigenous offenders (see review by Jeffries & Bond, 2011a). In contrast, more recent statistical analyses of lower court sentencing suggest that parity may only be operating at the higher court level (Bond & Jeffries, 2011a; Jeffries & Bond, 2011b).

To understand better what these analyses are telling us about the sentencing of Indigenous offenders, more qualitative research strategies that provide insights into the process and meaning of the sentencing process are required. Statistical analyses allow us to identify whether there is equality or inequality (on average) in sentencing outcomes after accounting for a range of sentencing factors and if any of these factors are differentially distributed across Indigenous and non-Indigenous offenders (e.g. criminal history). In contrast, qualitative analyses assist us in understanding how judges perceive or refer to Indigenous offenders and their histories, and how they qualitatively interpret the circumstances of Indigenous and non-Indigenous offenders to justify their sentencing decisions. To date, this
type of research has been done primarily through qualitative narrative analyses of judges’ higher court sentencing remarks (Jeffries & Bond, 2010; Jeffries & Bond, 2012).

However, the perspectives of those who work within the courts—especially Indigenous people who are directly involved in the sentencing process—about the sentencing process is often overlooked. Although consultation with actors within the criminal justice system frequently occurs in the assessment of new justice initiatives (e.g. Indigenous Courts, Circle Sentencing), those involved in the ‘mainstream’ criminal jurisdiction do not appear frequently in sentencing disparities research, nationally or internationally (cf. Mackenzie 2005).

This article aims to start addressing this gap by reporting the main themes to emerge from a survey of judicial officers and police prosecutors, as well as focus groups with Community Justice Groups in Queensland. In particular, we are interested in their assessments of current sentencing practice and outcomes for Indigenous offenders. Our aim is to identify common perceptions of the sentencing process for Indigenous offenders of those who work at the ‘coal face’. (This article draws on a larger project reported in Bond, Jeffries and Loban, 2011.)

The Current Research

Background and Context

Over a decade ago, Queensland, along with a number of other states, developed an Indigenous justice agreement (the Queensland Aboriginal and Torres Strait Islander Justice Agreement) to address a range of social, economic, cultural and justice issues. A common feature of these agreements was the introduction of strategies aimed at reducing Indigenous over-representation in imprisonment (Allison & Cunneen, 2010). The Queensland Aboriginal and Torres Strait Islander Justice Agreement (Justice Agreement) set a target of a 50%
reduction in the Indigenous incarceration rate by 2011.\textsuperscript{1} In 2005, the Queensland Government commissioned an independent evaluation of the Justice Agreement (see Cunneen, Collings & Ralph, 2005).\textsuperscript{2} One of the evaluation’s recommendations was the establishment of an Indigenous Criminal Justice Agenda to identify how the criminal justice system might more effectively respond to the problem of Indigenous over-representation, including an analysis of sentencing disparities between Indigenous and non-Indigenous offenders\textsuperscript{3} (Cunneen, Collings & Ralph, 2005, p.xxvi). This led to the commissioning of research on Indigenous sentencing disparities in Queensland’s criminal courts (see Bond, Jeffries & Loban, 2011 for full details of this research). This article draws on research conducted as part of this broader project on the sentencing of Indigenous offenders in Queensland’s criminal courts.

Data Sources

We rely on data obtained from three sources: questionnaires administered to the Queensland judiciary; questionnaires administered to Queensland Police Service prosecutors; and focus groups with members of community justice groups. Community justice groups, funded by the Queensland Department of Justice and Attorney-General, are community-based, consisting of elders and other respected members of their respective Indigenous communities. Although their functions are much broader than criminal sentencing,\textsuperscript{4} these groups play a vital role in the sentencing process for Indigenous offenders. Under the Penalties and Sentences Act 1992 (Qld), when sentencing Indigenous offenders, the court must consider submissions made by community justice group representatives, which may include “cultural considerations” (s.9 (2)).

\textsuperscript{1} The initial Queensland Justice Agreement has now expired, being replaced by an Indigenous justice strategy in December 2011 (Queensland Government, 2011).
\textsuperscript{2} For a broader assessment of the impact of Indigenous justice agreements in Australia, see Allison & Cunneen, 2010.
\textsuperscript{3} Court statistics at the time showed that compared to non-Indigenous offenders, a higher proportion of Indigenous defendants received custodial orders (Cunneen, Collings & Ralph, 2005, pp.56).
\textsuperscript{4} In addition to their role in sentencing, their functions include the development strategies within Indigenous communities (often in consultation with magistrates, police, corrective services personnel and staff from other government and non-government agencies) for dealing with justice-related issues and decreasing Indigenous contact with the criminal justice system; as well as the support of Indigenous peoples involved with the criminal justice system.
Questionnaire/Focus Group Administration and Description of Participants

The questionnaires were developed through a consultative process with key stakeholders in the judiciary, magistracy and the Legal Services Branch (Queensland Police Service). The questionnaires consisted of a combination of close-ended and open-ended questions, structured around four areas: differences (if any) in the sentencing of Indigenous and non-Indigenous offenders; potential problems in the sentencing process for Indigenous offenders; the impact of recent court initiatives around Indigenous sentencing; and, suggestions for reform in current sentencing practices for Indigenous offenders. Approval for their administration was obtained (as appropriate) from the Chief Justice (Supreme Court), Chief Judge (District Court), Chief Magistrate, the Assistant Commissioner, Operations Support Command (Queensland Police Service), and the Manager, Review and Evaluation Unit (Queensland Police Service) (Bond, Jeffries & Loban, 2011).

The judicial questionnaire was mailed to all judges (District and Supreme Courts) and magistrates listed on the Queensland court website as at December 2009. In total, 85 magistrates, 39 District Court judges and 28 Supreme Court judges were approached to complete the questionnaire. A pre-paid self-addressed envelope was provided to facilitate the return of the survey. The response rate (11.8%, n=18) was low. Of those magistrates and judges who responded, the majority were male, and had more than three years of judicial experience. None of the magistrates or judges identified themselves as being from an Indigenous background (see Table 1 below).

[INSERT TABLE 1 ABOUT HERE]
The prosecutorial questionnaire was emailed to all police prosecutors (approximate number = 200). Police prosecutors were asked to respond by returning the completed survey via email. The response rate (16.5%) was low, with a total of 33 participants. The majority of the police prosecutors who responded were male; few identified themselves as Indigenous; and the majority reported having more than three years prosecutorial experience (see Table 2 below).

Finally, to recruit participants for the focus groups, a list of community justice groups (n=43) was provided by the Queensland Department of Justice and Attorney-General. All groups were invited to participate. Recruitment occurred in two stages: at the state-wide conference for community justice group coordinators, we presented a summary of the project, its aims and our research plans; this was then followed-up with letters sent to the community justice groups. Interviews/focus groups were conducted with eight community justice groups, involving a total of 21 participants. Semi-structured interview prompts, based around the same areas as the judicial/prosecutorial questionnaires (see above), were developed, and then modified as required during each focus group to allow participants a voice in deciding on the relevant issues.

For reasons of confidentiality and anonymity, only background information on the focus group participants can be presented. Participants reflected a range of ages, with both men and women represented. The length of membership in a community justice group ranged from a few months to eight years. All participants were from remote and regional community justice groups. No members from urban community justice groups were available for consultation.
As this description of the participants reveals, the views reported in this paper are largely those of legal professionals working within the Magistrates Courts (i.e. lower court). Police prosecutors do not practise in the higher courts; the overwhelming proportion of judicial officer participants was magistrates. Further, as will be discussed later, community justice groups work predominantly in the lower courts, rarely providing sentencing submissions in the higher courts.

Findings

Based on frequencies and thematic content analysis, five key themes about the sentencing of Indigenous offenders emerged. These are:

- the differential accumulation of criminal history;
- the role (or lack thereof) of customary law;
- language and communication barriers;
- the lack and location of community-based alternatives, especially around alcohol and drug rehabilitation; and
- the need for socially and culturally responsive practices.

Differential accumulation of criminal history

For community justice group participants, the detrimental impact of the accumulation of criminal histories on sentencing was repeatedly identified as a significant issue in the sentencing of Indigenous offenders.\(^5\) Participants implicitly saw this as a unique factor for Indigenous offenders with the problem of rapidly accumulating criminal histories located within racially disparate policing practices. In particular, community justice group participants saw Indigenous offenders being sentenced to prison terms for ‘trivial’ offences

---

\(^5\) Many community justice group participants were generally not present at non-Indigenous sentencing matters, due to the few non-Indigenous offenders in their locations, or their role in Indigenous sentencing matters. Thus, they felt unable to assess more generally whether overall there were differences in the sentencing process for Indigenous and non-Indigenous offenders.
(i.e. public nuisance), because of criminal histories resulting from repeat (often unnecessary) police charging. As an example of this concern, one group stated that in their experience “after the fourth public nuisance offence, the offender would usually go to prison”; then every “public nuisance offence thereafter would result in higher and higher penalties and increasing lengths of imprisonment.” Thus, a person may only ever commit public nuisance offences but the cumulative effect of the criminal history is such that an offender may ultimately go to prison for “swearing in public”. In the view of community justice group participants, the punishment in such instances does “not fit the crime.”

More extensive criminal histories (including breaches of prior court orders) was also reported by police prosecutors (n=22) as commonly exacerbating sentencing severity for Indigenous, compared to non-Indigenous, offenders. Other differences commonly identified by judicial and prosecutorial participants between the circumstances and social histories of Indigenous and non-Indigenous cases impacting on sentencing outcomes included: alcohol and substance abuse (n=9 judicial officers; 20 police prosecutors); and family dysfunction and disadvantage (n=7 judicial officers; 13 police prosecutors). (Participants could provide more than one response.)

Interestingly, criminal history was not frequently identified by judicial participants as a typical difference between Indigenous and non-Indigenous offenders.

Role (or lack thereof) of customary practices

We were interested in whether customary and cultural practices were frequently raised in submissions around mitigation in Indigenous sentencing matters. Community justice group participants saw a general failure by the Queensland criminal courts to take into account traditional law and culture in the sentencing process. (Under s.9(2) Penalties and Sentences

---

6 We were unable to ask a direct question about whether participants perceived the sentencing process as producing disparate sentencing outcomes based on Indigenous status. During our consultation process, we became quickly aware that this question conflicted with legal conceptions that ‘justice was blind’ to all but relevant sentencing criteria, and thus became a problem in progressing our research.
Act 1992 (Qld), “cultural considerations” can be introduced in sentencing matters; and that community justice groups only operate in the lower courts.) The results from the judicial and prosecutorial questionnaires reinforce this position of customary and cultural practices in the sentencing process. The majority of judicial participants reported that in their sitting experience, Indigenous customary practices ($n=13$ out of 18) and punishment under Indigenous customary practices ($n=15$) had never been submitted as a mitigating factor in defence sentencing submissions. For example, one participant commented: “Usually, [customary and cultural practices are] used to explain conduct rather than to excuse or mitigate the behaviour and can be helpful to understand events rather than leading to lower penalty to any great extent”. Similarly, the majority of police prosecutors reported that they had never heard of ($n=18$), or did not know, a defence submission referencing customary punishment or practices as a possible mitigating factor at sentencing.

These responses suggest that there may be a disjunction between the purpose of the community justice group submissions and the way these submissions are being interpreted by judicial officers. From the focus groups, community justice groups clearly see their role as informing judicial decision-making at sentencing about customary and cultural practice (and thus act as mitigating factors). By contrast, judicial officers and prosecutors appear to perceive those submissions as being more explanatory than mitigating in nature. This may represent a breakdown in communication across a cultural divide.

Language and communication barriers

The issue of communication and understanding during the sentencing process and subsequently sentence decision emerged as significant for both judicial and community justice group participants. The problems of language and communication for Indigenous defendants was identified through questions about the problems that might be encountered in
the sentencing process, as well as questions about suggested changes to improve the sentencing process for Indigenous offenders.

When asked whether a range of factors were problems in making sentencing decisions, a lack of available court interpreters (n=11 out of 18) was identified by judicial participants, although responses indicated these problems in both Indigenous and non-Indigenous cases. (To put this in context, the factors most frequently identified by judicial participants were around community-based sentencing alternatives (n=12), which is discussed later.) Similarly, community justice group participants, regardless of location, also identified language and communication difficulties as a common problem for Indigenous offenders in the sentencing process. In particular, participants expressed grave concern that interpreters are not routinely and regularly used for Indigenous offenders. In many instances, participants felt that due to language barriers, Indigenous defendants failed to fully comprehend their sentence and legal obligations. However, individual magistrates could make a real difference: as some community justice group participants pointed out, “a ‘good’ magistrate will make sure the person understands” what occurred in court.

Further, when asked for suggestions to improve the sentencing process for Indigenous offenders, judicial and community justice group participants both advocated for initiatives that could help alleviate language barriers for Indigenous defendants in the courtroom. Community justice group participants argued that further training is required to assist judicial officers to: (1) comprehend better issues around language, understanding, communication and culture; and (2) identify better when a court interpreter was needed. However, from the perspective of judicial participants, it is access to, and availability of, interpreters (and also Indigenous court liaison officers) that is problematic, rather than their inability to recognise when one was needed. (Recent research undertaken by Lauchs (2010) similarly noted the lack
of interpreter services in Queensland courts as an on-going problem for Indigenous peoples.) For example, one magistrate commented: “interpreters are needed in all courts ... court liaison officers or someone with some knowledge may assist ... glossy brochure [and] policy documents are not enough”. Similarly, another magistrate drew attention to the problem of language barriers in more remote Indigenous communities: “interpreters [are needed] for defendants in Cape and Gulf communities ... [what is needed is] equity for all Indigenous people across state for access to these processes”.

Unlike the other participants, a lack of available court interpreters was not frequently identified by police prosecutors as a problem in the sentencing process ($n=1$ participant identified this issue). However, prosecutorial participants did comment about the need for more funding for legal representation (such as Aboriginal and Torres Strait Legal Services) to improve the sentencing process for Indigenous defendants. Arguably, legal representation may be part of improving the understanding of the process for Indigenous defendants.

_Lack and location of community-based alternatives, especially around alcohol and drug rehabilitation_

From the focus groups and questionnaires, there was a strong consensus that there was a lack of local community-based alternatives, especially around alcohol and drug rehabilitation. This was seen to restrict the options available to judges and magistrates in sentencing Indigenous offenders. For example, when asked whether a range of factors were problems in making sentencing decisions, the factors most frequently identified by judicial participants were: (1) a lack of community-based sentencing alternatives in some locations ($n=12$ out of 18); and (2) the delivery of community-based sentencing in some locations ($n=12$). These were also identified by prosecutorial participants ($n=11$ out of 33 and $n=12$, respectively). Although their responses indicated that these problems are seen as an issue generally, and not
specific to Indigenous defendants, their suggestions for improving the sentencing process clearly indicated that the issues around community-based alternatives differentially impacted on the sentencing of Indigenous offenders as their communities were often in remote and regional locations.

Typical examples of comments around community-based alternatives (when asked for strategies to improve the sentencing process for Indigenous offenders) included:

- Community based orders … [are] disappearing from the available sentencing regime … community based orders are now [virtually] non-existent … a significant change [is needed] (judicial participant)
- More community-based sentencing options in all courts (prosecutorial participant)
- Further sentencing options [need to be] available that are appropriate for Indigenous persons (police participant)
- Probation and community service need to be geared to the Indigenous offender. One size does not fit all (judicial participant)
- Equality compared with equity…sending black and white offenders to the same … probation programs and community service projects might be equality in action but not equity…it is discriminatory not to set up Indigenous centric options (judicial participant).

Community justice group participants expressed similar concerns about a lack of community-based sentencing alternatives, diversionary options and rehabilitation programs, but their concerns particularly focused on the absence of alcohol and drug rehabilitation support services available to the court for referral and/or sentencing. Alcohol was seen as a significant factor in the vast majority of offences committed by Indigenous people. However, participants observed that rather than extending or continuing existing programs, alcohol and drug rehabilitation programs were being closed down. Even where available, these options often failed as true alternatives: as participants noted, the location of these programs is an
impediment for their use in sentencing alternatives. Generally located in larger communities or regional centres, “offenders do not want to go to another community so far from their own communities,” as this means either leaving their families, or in some cases losing their accommodation so that they are homeless upon return.

Need for socially and culturally responsive practices

The final common theme to emerge from the judicial and prosecutorial questionnaires and the Community justice groups was the need for socially and culturally responsive justice practices, including for sentencing. We can see hints of that in the concerns expressed around the type of community-based sentencing options (see above). This theme of responsive justice practices was highlighted through the responses of the participants to questions about a range of diversionary programs available in Queensland, many of which are aimed at Indigenous offenders. We asked participants about specialist sentencing courts (Murri Court;\(^7\) Drug Court\(^8\)), a bail-based diversionary initiative providing Indigenous offenders charged with alcohol-related offences access to culturally appropriate treatment prior to sentencing (i.e. Indigenous Alcohol Diversion Program\(^9\)) and programs aimed at providing Indigenous offenders with more timely and culturally appropriate proceedings (i.e. Remote Justices of the Peace Magistrates Court Program,\(^10\) Community Justice Groups). Overall, there was broad consensus across the participant groups who saw these types of initiatives as positively impacting the sentencing of Indigenous offenders.

---

\(^{7}\) The Murri Court is an Indigenous-specific sentencing court that (theoretically) takes “into account cultural issues by providing a forum where Aboriginal and Torres Strait Islanders have input into the sentencing process” (Department of Justice and Attorney-General, 2008).

\(^{8}\) The Queensland Drug Court Program is a specialist sentencing court which aims to assist offenders in overcoming their drug dependence and associated criminal behaviour through court enforced and supervised rehabilitation programs. Offenders’ sentences are suspended while they undertake the rehabilitation program (Queensland Health, 2012; Queensland Courts, 2012).

\(^{9}\) This program was offered in a pilot/trial phase (see Queensland Health, 2012 for further information) and is only available in certain locations in northern Queensland. The final evaluation was completed in February 2010 (SuccessWorks, 2010).

\(^{10}\) This program allows Aboriginal and Torres Strait Islander Justices of the Peace (in remote Indigenous communities) to “constitute a Magistrates Court in the absence of a Magistrate, and to hear and determine charges for simple offences and some indictable offences that can be dealt with summarily, where a defendant enters a guilty plea” (Department of Justice and Attorney-General, 2011 p. 3). This program is argued to create a “swifter, more accessible form of justice for Indigenous communities and to provide greater community ownership and involvement in the justice system” (Cumneen et al., 2010 p. 21).
The most frequently cited program was the Murri Court among judicial and prosecutorial participants, with about half of the judicial (n=9 out of 18) and almost three-quarters of prosecutorial (n=24 out of 33) participants agreeing that positive outcomes were being achieved by this program. For the community justice group participants, there was a general consensus across the focus groups that community justice groups, Queensland’s Indigenous Alcohol Diversion and Remote Justices of the Peace Magistrates Court Program were having positive impacts on sentencing for Indigenous defendants.

Participants expressed a range of views as to why these programs impacted positively on the sentencing of Indigenous defendants. Typical responses included: the ability of these initiatives to address the underlying causes of Indigenous offending; the provision of viable rehabilitative alternatives to imprisonment; and the cultural appropriateness of outcomes able to be delivered through the Murri Court and Queensland Indigenous Alcohol Diversion Program. All community justice group participants saw their role as making the mainstream sentencing process more culturally relevant (and thus fairer) to Indigenous defendants, a role that they reported was taken seriously by magistrates. In other words, the importance of these initiatives was seen in culturally responsiveness to problems faced by Indigenous offenders, which attempt to provide local (i.e. based in communities) options other than imprisonment for Indigenous offenders. As a result, there was strong support for further development and funding of these initiatives as a way of improving the courts’ response to Indigenous offenders.

The perception across participants groups of the need for culturally and socially responsive sentencing processes is best summarised by community justice group participants:
Each community should have its own alcohol and drug support service … [because] Murris always come back to their own community (community justice group participant, supporting Queensland Indigenous Alcohol Diversion program)

[People] understand what is being said … This is because the courts are run in the language of the community (community justice group participant, in response to Remote Justices of the Peace Magistrates Court program)

However, there was concern expressed among community justice group participants that these types of initiatives were unevenly available to Indigenous defendants. For example, community justice group participants reported that limited resources and subsequent time constraints meant that community justice groups were not always able to provide sentencing submissions in the lower courts, and rarely in the District Court. Further, the presence of a Murri Court in an area generally meant that community justice groups only had time to participate in this specialist court, resulting in few submissions at mainstream sentencing hearings.11

Discussion
Contextualising the sentencing process for Indigenous offenders requires us to move away from a sole reliance on statistical analyses of sentencing disparities. Consultations with those who work at the sentencing ‘coal face’ (such as judicial officers, prosecutors and Indigenous people working in the sentencing process) are an important site for understanding whether sentencing is an equitable process—and not just simply an equal process—for Indigenous offenders. This article presents the key themes from a survey of judicial officers and police prosecutors, as well as focus groups with members of community justice groups in Queensland. The views expressed in the current research by those actively working in the sentencing process highlight a number of inequities that indirectly disadvantage Indigenous offenders.

11 Similar issues were also noted in the recent evaluation of the Community Justice Group program (see KPMG, 2010).
offenders. Although initiatives have been developed to address a number of these concerns (e.g. Murri Court’s, community justice groups), the view is that more needs to be done. This outcome is not surprising, and is consistent with findings of the evaluation of the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* (now over six years ago) (Cunneen, Collings & Ralph, 2005).

In particular, although direct sentencing discrimination was not highlighted as a problem by the research participants, the accumulation of disadvantage indirectly by Indigenous defendants may result in sentences that on the surface appear equal, but may be considered unjust. For example, the accumulation of criminal histories—through racially disparate policing practices—culminate at sentencing, making a term of imprisonment more likely for Indigenous people. In other words, due to differences in policing, Indigenous defendants are more likely to come to court with criminal histories. The problem of discriminatory policing practices against Indigenous people (including over-policing and the higher propensity to arrest) is well recognised, and should come as little surprise (see Cunneen, 2001; Jeffries & Dillon, 2009). For example, in Queensland, the rate of Indigenous adult arrests has been over ten times higher than the rate for non-Indigenous people (Cunneen, Collings & Ralph, 2005 pp. 48).

The differential accumulation of criminal history for Indigenous defendants, and its consequent indirect impact on sentencing, has long been recognised (see e.g. Gale & Wundersitz, 1987). Yet, what has received less attention is the place of criminal history in sentencing practice: the idea that criminal history should be taken into account at sentencing is a euro-centric view of justice. As one community justice group participant clearly stated: in “our way”—the way of their community and in accordance with their cultural practices—once the punishment for wrongdoing is completed, “you get a clean slate.” The process of
wrongdoing accumulating over time, as is the case in European based systems of justice, means that defendants continue to be punished for past behaviour, not allowing for reintegration back into their communities.

Similarly, the problem of Indigenous alcohol/substance misuse (which participants identified as a key issue in Indigenous offending) could also result in the over-use of prison sentences. Overwhelmingly, our research participants identified a lack of community-based sentencing options, especially culturally appropriate initiatives targeted at alcohol and drug rehabilitation, as a significant problem with the current sentencing process for Indigenous offenders. This problem is likely exacerbated in remote Indigenous communities. In their evaluation of the Justice Agreement, Cunneen, Collings and Ralph (2005 pp. xv) found that a lack of available “supervision for non-custodial sentencing options in Indigenous communities.” Thus, sentencing becomes an inequitable process, as particular sentencing options are in practice simply unavailable to Indigenous defendants sometimes by virtue of the fact that they live in remote areas.

**Conclusion**

Overall, while prior statistical sentencing analyses are useful in identifying whether (or not) substantive equality exists between Indigenous and non-Indigenous offenders, equality does not necessarily translate into equity. This important distinction was well summarised by one research participant (to reiterate):

Equality compared with equity...sending black and white offenders to the same ... probation programs and community service projects might be equality in action but not equity...it is discriminatory not to set up Indigenous centric options (judicial participants).
Thus, research and policy on sentencing disparities needs to explore and consider the process, as well as the outcomes, of sentencing.

Acknowledgements

This paper reports research that was part of a larger project commissioned by the Queensland Department of the Premier and the Cabinet, as part of the Indigenous Criminal Justice Research Agenda. We would like to acknowledge: the support of the Department, in particular Dr Andrew Ede and Ms Zoe Ellerman; and the research assistance of Michael Cerruto. We also sincerely thank all those participants who took the time to respond to our questions.

The views reported in the paper are those of the authors, and do not necessarily reflect the policies or views of the Department of the Premier and the Cabinet (Qld).

References


21


Table 1. Background Characteristics, Magistrates and Judges, Queensland (N=18)

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>% (n)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex of participant</td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>61.1 (11)</td>
</tr>
<tr>
<td>Female</td>
<td>38.9 (7)</td>
</tr>
<tr>
<td>Sitting court</td>
<td></td>
</tr>
<tr>
<td>Higher courts</td>
<td>5.6 (1)</td>
</tr>
<tr>
<td>Lower courts</td>
<td>94.4 (17)</td>
</tr>
<tr>
<td>Years of judicial experience</td>
<td></td>
</tr>
<tr>
<td>&lt; 3 years</td>
<td>22.2 (4)</td>
</tr>
<tr>
<td>3-9 years</td>
<td>44.4 (8)</td>
</tr>
<tr>
<td>&gt; 9 years</td>
<td>33.3 (6)</td>
</tr>
<tr>
<td>Indigenous background</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>0.0 (0)</td>
</tr>
<tr>
<td>No</td>
<td>100.0 (18)</td>
</tr>
</tbody>
</table>
Table 2. Background Characteristics, Police Prosecutors, Queensland (N=33)

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>% (n)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex of participant</td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>63.6 (21)</td>
</tr>
<tr>
<td>Female</td>
<td>36.4 (12)</td>
</tr>
<tr>
<td>Years of prosecutorial experience</td>
<td></td>
</tr>
<tr>
<td>&lt; 3 years</td>
<td>18.2 (6)</td>
</tr>
<tr>
<td>3-9 years</td>
<td>66.7 (22)</td>
</tr>
<tr>
<td>&gt; 9 years</td>
<td>15.2 (5)</td>
</tr>
<tr>
<td>Indigenous background</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>6.3 (2)</td>
</tr>
<tr>
<td>No</td>
<td>93.8 (31)</td>
</tr>
</tbody>
</table>