DIFFERENTIAL SENTENCING OF INDIGENOUS OFFENDERS:

WHAT DOES RESEARCH TELL US?

by Christine Bond and Samantha Jeffries

INTRODUCTION

A growing body of research indicates that the differential treatment of Indigenous defendants (compared to non-Indigenous defendants) at sentencing is more complex than what is shown by baseline court statistics. For example, baseline court data on sentencing outcomes show that Indigenous offenders are more likely to be sentenced to prison than non-Indigenous defendants in Australia.[1] However, baseline court statistics cannot account for differences in offender and case characteristics. For instance, there are well-known (and understandable) differences in the typical criminal histories of Indigenous and non-Indigenous defendants, which would affect sentencing outcomes. Once we adjust for such differences, research suggests that the disparity between Indigenous and non-Indigenous sentencing outcomes depends on the court environment.

This paper presents a brief overview of the current status of Australian research on Indigeneity and sentencing outcomes in the *adult* conventional (higher and lower), problem solving and Indigenous sentencing courts.

SENTENCING INDIGENOUS DEFENDANTS TO PRISON

Snowball and Weatherburn (2006 and 2007)[2] provide the first attempt in Australia to systematically examine, using methodologically rigorous statistical techniques, the impact of Indigenous status on imprisonment sentencing decisions in New South Wales criminal courts. After adjusting for offender and case factors, no significant difference was found between Indigenous and non-Indigenous offenders in the likelihood of imprisonment for those who had not previously served a prison sentence and were not currently on remand for another offence.[3] Further, in analyses of all offenders sentenced in New South Wales' criminal courts, Snowball and Weatherburn showed only a 'residual effect' of Indigeneity on sentencing.[4] After adjusting for a range of offender and case characteristics, Indigenous offenders were marginally more likely (1 per cent) than non-Indigenous offenders to be sentenced to prison.

Findings of parity (or even leniency) in higher court sentencing have been found consistently in research on other jurisdictions. In Queensland's and Western Australia's higher courts (ie District and Supreme), we found parity between Indigenous and non-Indigenous offenders in the decision to imprison, after adjusting for a broader range of offender and case characteristics.[5] Similarly, an analysis of the likelihood of an imprisonment order over time (1996–2005) in Western Australia's higher courts[6] found that Indigenous women were on average less likely than non-Indigenous women in statistically similar circumstances to be incarcerated. Interestingly, when we adjusted for offender and case differences using a matched-pair technique, Indigenous offenders were *less* likely than non-Indigenous defendants to be sentenced to imprisonment in South Australia's higher courts.[7] In other words, Indigenous status had a direct yet *positive* impact on the decision to imprison.

In contrast, patterns indicating negative discrimination are common in studies of lower court sentencing. After adjusting for differences in offender and case characteristics,[8] Indigenous offenders are *more* likely to be sentenced to prison than comparably situated non-Indigenous defendants. An analysis of Indigenous status and sentencing in Queensland's Magistrates Courts (ie lower courts) showed that although initial differences in the likelihood of imprisonment reduced, Indigenous offenders remained significantly more likely than non-Indigenous offenders to be sentenced to prison after adjusting for offender and case characteristics.[9] Similar patterns of negative discrimination were also found in studies of the lower courts in South Australia and New South Wales.[10]

Together, these studies highlight two key issues about the sentencing of Indigenous defendants. First, the initial Indigenous/non-Indigenous differences in the likelihood of a prison sentence can be largely explained by existing differences in the offender and case histories of Indigenous and non-Indigenous offenders. In particular, Indigenous defendants on average come before the courts with more

extensive and serious criminal histories,[11] a factor that plays a large role in sentencing decisions.

Second, the court environment matters for the sentencing of Indigenous defendants. Higher court judges and lower court magistrates operate under different constraints.[12] Higher court judges are often presented with extended pleas of aggravation and mitigation by defence counsel and prosecution, are provided with written or oral pre-sentence reports and victim impact statements, and may adjourn proceedings to consider the appropriate sentence. In contrast, lower court magistrates make sentencing decisions under tighter time constraints and with less information. Sentencing decisions in Australia's lower courts are frequently made within a matter of minutes with information about defendants and their circumstances limited to brief statements made by defence counsel, the offender or police prosecutors. When faced with such practical constraints, as time-poor magistrates are in the lower courts, a lack of reliable information about offenders' social histories may mean that stereotypical assessments could influence the sentencing process.[13]

Research on the sentencing of Indigenous defendants in the problem-solving and Indigenous courts provides further support for this interpretation of lower court sentencing outcomes for Indigenous defendants.

PROBLEM-SOLVING AND INDIGENOUS COURTS

Unlike conventional lower court magistrates, judicial officers making sentencing decisions within the problem-solving and Indigenous court environments have more time.[14] The sentencing environment within a problem-solving court is underpinned by the notion of therapeutic jurisprudence. Being 'therapeutic' requires judicial contemplation about offenders and their cases before reaching a sentencing decision. Predictably perhaps, we found that, after adjusting for the same offender and case characteristics as in our conventional lower court studies, Indigenous offenders were *less* likely than non-Indigenous offenders to be sentenced to prison by the problem-solving courts (ie drug, mental impairment and family violence courts) in South Australia.[15]

Similarly, Indigenous sentencing court environments afford magistrates additional time and information about defendants and their cases. Further, the purpose of the Indigenous sentencing court is to engender a more culturally responsive sentencing process. Within this context, for example, magistrates will be acutely aware of the devastating impact of incarceration on Indigenous people. Perhaps unsurprisingly, a comparative analysis of sentencing outcomes in South Australia showed that Indigenous defendants sentenced in the Nunga (Indigenous) Court are *less* likely to be imprisoned than *statistically similar* Indigenous defendants in the conventional court.[16]

SENTENCING INDIGENOUS DEFENDENTS TO NON-IMPRISONMENT ORDERS

Research on Indigeneity and sentencing has been predominately focused on the judicial use of the immediate imprisonment order. We know little about the independent effect of Indigeneity on non-imprisonment orders. In an exploratory study of non-imprisonment orders in Queensland's higher courts, we found that compared to non-Indigenous defendants in statistically similar circumstances, unsupervised non-imprisonment orders (such as good behaviour bonds and community service hours) were less preferred sentencing options for Indigenous offenders, when compared to suspended imprisonment and supervised sentencing options.[17] A study of the decision to impose a monetary order in Queensland's Magistrates Court found that when sentenced under similar circumstances, Indigenous defendants were *more* likely to be fined than non-Indigenous defendants.[18]

This pattern in the use of non-imprisonment orders for Indigenous defendants may reflect the difficulties in delivering and supervising community-based sentencing options in non-urban locations. Consultations with Indigenous criminal justice groups, judges/magistrates and police prosecutors also support this interpretation, with these stakeholders frequently noting the limited availability of these types of sentencing options.[19] The lack of available community-based alternatives differentially impacts on Indigenous defendants for two key reasons. Indigenous defendants are more likely to reside in remote and outer regional locations, and over-representation of Indigenous contact with the criminal justice system may be greater in remoter locations.[20]

CONCLUSION

Disparity in sentencing outcomes for Indigenous defendants is of grave concern. In this paper, we briefly overviewed the findings of current research on Indigenous disparities in sentencing outcomes in Australia. There is good news. There is strong evidence of parity (and leniency in one jurisdiction) in the likelihood of a prison sentence in the higher criminal courts, as well as evidence that there is a lower likelihood of imprisonment for Indigenous defendants in the problem-solving and Indigenous courts. However, in the conventional lower

courts, research suggests that Indigenous offenders may be more likely to receive a prison sentence compared to similarly positioned non-Indigenous offenders. Studies also indicate that in both the conventional higher and lower courts, community-based alternatives may be under-used for Indigenous defendants (at least in Queensland).

What do these patterns of findings suggest for the future? We highlight three particular directions. First, strategies that increase and improve the information available to judicial officers about defendants and their histories are vitally important, as shown by the research on sentencing outcomes in the problem-solving and Indigenous courts. These types of initiatives may create an environment which can provide more responsive and appropriate sentencing outcomes for Indigenous defendants. Second, in all court contexts, a key predictor of sentencing outcomes is the extent and nature of offenders' criminal histories. The differential accumulation of criminal histories by Indigenous defendants means that strategies earlier in the criminal justice processing should be prioritised. Third, there is a clear need to think about alternative ways to deliver community-based sentencing options. Although limited, research suggests that the use of imprisonment, suspended sentences and monetary orders in the sentencing of Indigenous defendants may in part be a response to the difficulties of supervising and managing community-based alternatives in outer regional and remote locations.

Finally, and importantly, the statistical analyses summarised in this paper identify whether substantive equality exists in the sentencing of Indigenous and non-Indigenous defendants. Substantive equality should not be confused with equity. The impact of the practices of colonisation, the history of community fragmentation due to government policies, and continuing cultural and community dislocation for Indigenous people creates a different sentencing context. As clearly recognised by a judicial officer in one of our studies, imposing the same sentencing order on Indigenous and non-Indigenous offenders with similar past criminal histories, current offending and immediate offending motivations may be, 'equality in action but not equity … it is discriminatory not to set up Indigenous-centric options'.[21]

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1 Current court statistics by Indigenous status are not readily available, but see, e.g., Joanne Baker, *The Scope for Reducing Indigenous Imprisonment Rates* (NSW Bureau of Crime Statistics and Research ('NSWBCSR'), Crime and Justice Bulletin No 55, 2001); Carol Castle, Adrian Barnett and Sophie Pointer, *Aboriginal People and the Criminal Justice System: comparison of Aboriginal and non-Aboriginal cases finalised in the Magistrates Court and Higher Courts of South Australia 1998* (SA Office of Crime Statistics, Issue No 13, 2000); Nini Loh and Anna Ferrante, 'Aboriginal Involvement in the Western Australian Criminal Justice System: A Statistical Review' (UWA Crime Research Centre, 2003); Chris Cunneen, Neva Collins and Nina Ralph, 'Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement' (University of Sydney, 2005).

2 Lucy Snowball and Don Weatherburn, *'Indigenous Over-Representation in Prison: The Role of Offender Characteristics'* (NSWBCSR, Crime and Justice Bulletin No 99, 2006); Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40(3) *Australian and New Journal of Criminology* 272-90.

3 Snowball and Weatherburn*, 'Indigenous Over-Representation in Prison',* above n 2.

4 Snowball and Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?', above n 2.

5 Christine Bond and Samantha Jeffries, 'Indigeneity and the Judicial Decision to Imprison: A Study of Western Australia's Higher Courts' (2011) 51(2) *British Journal of Criminology* 256–77; Christine Bond and Samantha Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts' (2012) 19(2) *Psychiatry, Psychology and Law* 169-83.

6 Christine Bond and Samantha Jeffries, 'Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts' (2010) 17(1) *Psychiatry*, *Psychology and Law* 70-8.

7 Samantha Jeffries and Christine Bond, 'Does Indigeneity Matter?: Sentencing Indigenous Offenders in South Australia's Higher Courts' (2009) 42(1) *Australian and New Zealand Journal of Criminology* 47-71.

8 In lower court studies, we have only been able to adjust for a more limited range of other sentencing factors (compared to the higher court studies). However, due to the nature of sentencing hearings in the lower courts, this may not have a significant effect on the findings. We discuss the implication of the nature of lower court hearings later in this paper.

9 Bond and Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts', above n 5.

10 Samantha Jeffries and Christine Bond, *Indigenous Disparity in Lower Court Imprisonment Decisions: A Study of two Australian Decisions, 1998-2008* (Australian Institute of Criminology, 2012).

11 The accumulation of criminal histories and contact with the criminal justice system by Indigenous defendants requires further unpacking which is beyond the scope of this paper.

12 Samantha Jeffries and Christine Bond, *The Sentencing of Indigenous Offenders in the Lower Courts: A Study of Three Australian Jurisdictions: Report to the Criminology Research Council* (Australian Institute of Criminology, 2011).

13 Darrel Steffensmeier, Jeffery Ulmer and John Kramer, 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male' (1998) 36 *Criminology* 763-98.

14 Samantha Jeffries and Christine Bond, 'Does Court Context Matter?: The Likelihood of Imprisonment for Indigenous and Non-Indigenous Offenders Sentenced in Problem-Solving Courts' (2012) 41(1) *International Journal of Law, Crime and Justice* 100-14.

15 Ibid.

16 Christine Bond and Samantha Jeffries, 'Indigenous Sentencing Outcomes: A Comparative Analysis of the Nunga and Magistrates Courts in South Australia' (2012) 14(2) *Flinders Law Journal* 359-82; The evaluation of Queensland's Murri Court focused on the broader category of *custodial* sentences (which in addition to immediate imprisonment orders, included immediate parole release, suspended prison sentences and custody in community orders), and thus cannot directly answer this question. This evaluation found that offenders in the Murri Court were more likely to receive a custodial sentence than Indigenous offenders in the conventional Magistrates Court, but these orders may not have been imprisonment orders, see Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court* (Canberra, Australian Institute of Criminology, 2010).

17 Christine Bond and Samantha Jeffries, 'Indigeneity and Non-Custodial Orders: Comparing Different Sentencing Outcomes in Queensland's Higher Courts' (Crime, Justice and Social Democracy Conference, Brisbane, July 2011). This study excluded imprisonment, disqualification of drivers' licence and monetary orders.

18 Samantha Jeffries and Christine Bond, 'Indigeneity and the Decision to Impose a Fine in Queensland's Magistrates Courts' (Australian Sociological Association Annual Conference, Newcastle, December 2011). This study excluded cases with imprisonment orders.

19 Christine Bond, Samantha Jeffries and Heron Loban, 'Inequities, Alternatives and Future Directions: Inside Perspectives on Indigenous Sentencing in Queensland' (2012) *Psychiatry, Psychology and Law*, DOI: 10.1080/13218719.2012.739934.

20 See Jeffries and Bond, above n 17; Jeffries and Bond, above n 18; Chris Cunneen, 'Crime, Justice and Indigenous People' in Elaine Barclay et al (eds), *Crime in Rural Australia* (Federation Press, 2008).

21 Bond, Jeffries and Loban, above n 19.

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